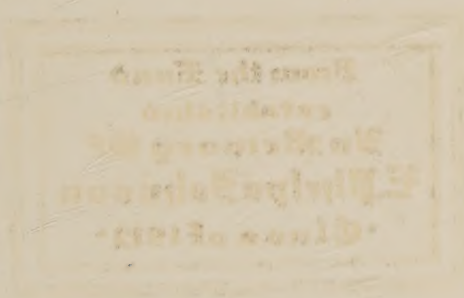
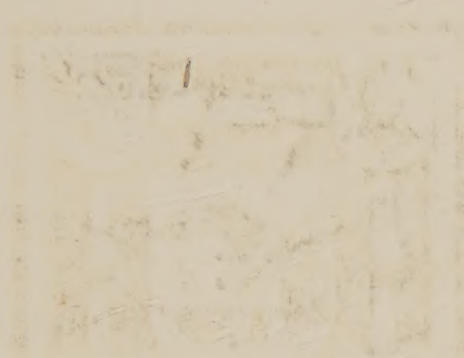




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Modern Legal Philosophy Series: Vol. XIII

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GENERAL INTRODUCTION TO THE SERIES

BY THE EDITORIAL COMMITTEE

“Until either philosophers become kings,” said Socrates, “or kings philosophers, States will never succeed in remedying their shortcomings.” And if he was loath to give forth this view, because, as he admitted, it might “sink him beneath the waters of laughter and ridicule,” so to-day among us it would doubtless resound in folly if we sought to apply it again in our own field of State life, and to assert that philosophers must become lawyers or lawyers philosophers, if our law is ever to be advanced into its perfect working.

And yet there is hope, as there is need, among us to-day, of some such transformation. Of course, history shows that there always have been cycles of legal progress, and that they have often been heralded and guided by philosophies. But particularly there is hope that our own people may be the generation now about to exemplify this.

There are several reasons for thinking our people apt thereto. But, without delaying over the grounds for such speculations, let us recall that as shrewd and good-natured an observer as DeTocqueville saw this in us. He admits that “in most of the operations of the mind, each American appeals to the individual exercise of his own understanding alone; therefore in no country in the civilized world is less attention paid to philosophy than in the United States.” But, he adds, “the Americans are much more addicted to the use of general ideas than

the English, and entertain a much greater relish for them." And since philosophy is, after all, only the science of general ideas—analyzing, restating, and reconstructing concrete experience—we may well trust that (if ever we do go at it with a will) we shall discover in ourselves a taste and high capacity for it, and shall direct our powers as fruitfully upon law as we have done upon other fields.

Hitherto, to be sure, our own outlook on juristic learning has been insular. The value of the study of comparative law has only in recent years come to be recognized by us. Our juristic methods are still primitive, in that we seek to know only by our own experience, and pay no heed to the experience of others. Our historic bond with English law alone, and our consequent lack of recognition of the universal character of law as a generic institution, have prevented any wide contact with foreign literatures. While heedless of external help in the practical matter of legislation, we have been oblivious to the abstract nature of law. Philosophy of law has been to us almost a meaningless and alien phrase. "All philosophers are reducible in the end to two classes only: utilitarians and futilitarians," is the cynical epigram of a great wit of modern fiction.¹ And no doubt the philistines of our profession would echo this sarcasm.

And yet no country and no age have ever been free (whether conscious of the fact or not) from some drift of philosophic thought. "In each epoch of time," says M. Leroy, in a brilliant book of recent years, "there is current a certain type of philosophic doctrine—a philosophy deep-seated in each one of us, and observable clearly and consciously in the utterances of the day—alike in novels, newspapers, and speeches, and equally in town

¹ M. Dumaresq, in Mr. Paterson's "The Old Dance Master."

and country, workshop and counting-house." Without some fundamental basis of action, or theory of ends, all legislation and judicial interpretation are reduced to an anarchy of uncertainty. It is like mathematics without fundamental definitions and axioms. Amidst such conditions, no legal demonstration can be fixed, even for a moment. Social institutions, instead of being governed by the guidance of an intelligent free will, are thrown back to the blind determinism of the forces manifested in the natural sciences. Even the phenomenon of experimental legislation, which is peculiar to Anglo-American countries, cannot successfully ignore the necessity of having social ends.

The time is ripe for action in this field. To quote the statement of reasons given in the memorial presented at the annual meeting of the Association of American Law Schools in August, 1910:—

The need of the series now proposed is so obvious as hardly to need advocacy. We are on the threshold of a long period of constructive readjustment and restatement of our law in almost every department. We come to the task, as a profession, almost wholly untrained in the technic of legal analysis and legal science in general. Neither we, nor any community, could expect anything but crude results without thorough preparation. Many teachers, and scores of students and practitioners, must first have become thoroughly familiar with the world's methods of juristic thought. As a first preparation for the coming years of that kind of activity, it is the part of wisdom first to familiarize ourselves with what has been done by the great modern thinkers abroad—to catch up with the general state of learning on the subject. After a season of this, we shall breed a family of well-equipped and original thinkers of our own. Our own law must, of course, be worked out ultimately by our own thinkers; but they must first be equipped with the state of learning in the world to date.

How far from "unpractical" this field of thought and research really is has been illustrated very recently in the Federal Supreme Court, where the opposing opinions in a great case (*Kuhn v. Fairmont Coal Co.*) turned upon the respective conceptions of "law" in

the abstract, and where Professor Gray's recent work on "The Nature and Sources of the Law" was quoted, and supplied direct material for judicial decision.

Acting upon this memorial, the following resolution was passed at that meeting:—

That a committee of five be appointed by the president, to arrange for the translation and publication of a series of continental master-works on jurisprudence and philosophy of law.

The committee spent a year in collecting the material. Advice was sought from a score of masters in the leading universities of France, Germany, Italy, Spain, and elsewhere. The present Series is the result of these labors.

In the selection of this Series, the committee's purpose has been, not so much to cover the whole field of modern philosophy of law, as to exhibit faithfully and fairly all the modern viewpoints of any present importance. The older foundation-works of two generations ago are, with some exceptions, already accessible in English translation. But they have been long supplanted by the products of newer schools of thought which are offered in this Series in their latest and most representative form. It is believed that the complete Series represents in compact form a collection of materials whose equal cannot be found at this time in any single foreign literature.

The committee has not sought to offer the final solution of any philosophical or juristic problems; nor to follow any preference for any particular theory or school of thought. Its chief purpose has been to present to Anglo-American readers the views of the best modern representative writers in jurisprudence and philosophy of law. The Series shows a wide geographical representation; but the selection has not been centered on the notion of giving equal recognition to all countries. Primarily, the design has been to represent the various

schools of thought; and, consistently with this, then to represent the different chief countries. This aim, however, has involved little difficulty; for Continental thought has lines of cleavage which make it easy to represent the leading schools and the leading nations at the same time.

To offer here an historical introduction, surveying the various schools of thought and the progress from past to present, was regarded by the committee as unnecessary. The volumes of Dr. Berolzheimer and Professor Miraglia amply serve this purpose; and the introductory chapter of the latter volume provides a short summary of the history of general philosophy, rapidly placing the reader in touch with the various schools and their standpoints. The Series has been so arranged (in the numbered list fronting the title page) as to indicate the order of perusal most suitable for those who desire to master the field progressively and fruitfully.

The committee takes great pleasure in acknowledging the important part rendered in the consummation of this project, by the publisher, the authors, and the translators. Without them this Series manifestly would have been impossible.

To the publisher we are grateful for the hearty sponsorship of a kind of literature which is so important to the advancement of American legal science. And here the Committee desires also to express its indebtedness to Elbert H. Gary, Esq., of New York City, for his ample provision of materials for legal science in the Gary Library of Continental Law (in Northwestern University). In the researches of preparation for this Series, those materials were found indispensable.

The authors (or their representatives) have cordially granted the right of English translation, and have shown a friendly interest in promoting our aims. The committee would be assuming too much to thank these learned

writers on its own behalf, since the debt is one that we all owe.

The severe labor of this undertaking fell upon the translators. It required not only a none too common linguistic skill, but also a wide range of varied learning in fields little travelled. Whatever success may attend and whatever good may follow will in a peculiar way be attributable to the scholarly labors of the several translators.

The committee finds special satisfaction in having been able to assemble in a common purpose such an array of talent and learning; and it will feel that its own small contribution to this unified effort has been amply recompensed if this Series measurably helps to improve and to refine our institutions for the administration of justice.

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EDITORIAL PREFACE TO THIS VOLUME

BY MORRIS R. COHEN¹

This volume, designed to figure as the closing one of the Modern Legal Philosophy Series, is a translation of Professor Tourtoulon's "Les principes philosophiques de l'histoire du Droit." A first instalment of that work was published in French (Payot & Cie, Lausanne, Paris) in 1908 (Book I, and Book II, Chaps. I-VII); the completed publication did not take place till 1919.

PIERRE DE TOURTOULON was born at Montpellier, France, August 11, 1867. His father, Baron Charles de Tourtoulon, was deeply interested in philology, history, and international politics; he founded and edited the "Revue des langues romanes" and the "Revue du monde latin." The young man began his university studies at Montpellier. Among his instructors in the Faculty of Law of that ancient and famous institution were Girard, the eminent scholar of Roman Law; Meynial, distinguished historian of law; and Charmont, a jurist of first rank (whose work has already been presented in translation in Volume VII of the present Series). The first two of these scholars are now attached to the faculty at Paris; the last is still adding lustre to the faculty at Montpellier.

Tourtoulon chose for the subject of his doctorate thesis the works of Placentinus, that Italian jurist who in the 12th century was the first to bring into France the scholarly fruits of Bologna's famous School of Law; he became a professor at Montpellier, and died there in 1192. In

¹ Professor of Philosophy in the College of the City of New York.

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modern France, research in the field of medieval Roman Law had not been receiving much attention at the period of Tourtoulon's university career; but it had progressed much further in Italy, and particularly in Germany, where the work of Savigny, in the first half of the 19th century, was being carried forward by many well-known scholars. One of the most esteemed of these was Fitting, professor at Halle (am Saal). Tourtoulon now proceeded to Halle, where he worked under Fitting's direction for several years.

In 1896, he returned to Montpellier to take his doctor's degree in law; the title of his thesis was, "Placentinus, his Life and Works." Continuing his researches in the field of medieval legal history, he published, in 1898, "Jacobus de Ravanis; a study based on unpublished MSS. in the National Library at Paris;" in 1900, "The Glosses of Irnerius in the pre-Accursian Gloss;" and in 1917, "The Velleian Law in the Glossators."

Meantime, Tourtoulon had, at Paris, enlarged the field of his researches to include general history of law; and in 1899 he was appointed lecturer on the History of Civil Procedure, at the University of Lausanne in Switzerland. Here he was also given, by Professor Brocher de la Fléchère, the conduct of a part of the latter's course in the general History of Law. He was appointed Professor of the History of Law in 1902, and was elected Dean of the Faculty of Law of Lausanne in 1920. In 1897 he was elected a member of the Academy of Aix-en-Provence; in 1899, of the Academy of Legislation; and in 1900, of the Academy of Padua.

The University of Lausanne, especially in the field of law and political science, has a distinguished past, reaching back to the foundation of the Lausanne Academy by Beza (the assistant and successor of Calvin), Barbeyrac, and other scholars. The teaching of the History of Law has at this University, by long tradition, some features

which rather mark it off from the course as usually conducted in Continental schools. It seeks to deal with universal history, not confining itself to national boundaries. Moreover, it does not draw any sharp line of distinction between the history of law and the philosophy of law, on one side, or the technique of law on the other side. This is illustrated by the chain of personalities who were the predecessors of Tourtoulon in that chair, — Hornung, eminent as a legal philosopher; Secrétan, father of the eminent philosopher of that name; Roguin, a legal technician and logician of the first rank, author of "The Rule of Law" (discussed in the present volume) and of the standard modern treatise on "Comparative Law of Succession"; and Brocher de la Fléchère, his immediate predecessor, a scholar whose profound contributions in comparative law and other fields deserve to be better known in this country.

The traditions of this chair have thus inspired Tourtoulon to give to his researches and lectures that free range of thought which would liberate the history of law from any conventional limitations, and would enable it to seek universal bases for its explanations and conclusions.

1. For the last century, Legal History has been predominantly a stronghold of ideaphobia and distrust of philosophy. Imbued with the principle of Induction, as preached by empirical philosophers, men supposed it simpler to find out the facts of the past and arrange them in historic order, than to face the complicated contemporary situation and interpret present facts in the light of unerdlying principles. But while a certain uncontemplative digging for facts buried in old documents or year-books, or a semi-mechanical arrangement of them in chronologic order, is easy enough, it does not constitute significant History. The true historian must know the mean-

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ing of the facts he wishes to get at; and the interpretation or meaning of past facts is at least as complicated as that of present-day facts.

Legal history cannot therefore be intelligently pursued without general ideas as to human purposes, causation, and historic laws, as well as ideas as to the meaning of laws and legal institutions. For Law is one of the means by which man tries to control his fate; and a careful historian, one as little addicted to "a priori" considerations as Vinogradoff,¹ cannot but be impressed with this aspect of his material.

Of course the legal historian may not be conscious of the general or philosophic ideas at the basis of his assumptions and procedure. One can walk well without giving much attention to the laws of mechanics and physiology. But in the higher reaches of thought, when we come to more complicated situations, conscious resort to principles becomes necessary. To hide from ourselves the general principles which we do in fact follow, and to delude ourselves into the belief that we have no philosophy, is certainly not conducive to clear thinking. In any case, it is highly desirable for one engaged in the history of Law to make the leading ideas of his science the object of careful study. This is what Professor Tourtoulon has done in the volume before us.

The result is a philosophy of law somewhat different from the usual treatises on the subject. It does not deal directly with the usual problems as to the fundamental principles or elements of the law, or of its leading institutions, such as personality, property, or family. It starts rather with the law as an active entity, and considers the logical and psychological aspects of its life and growth.

2. Tourtoulon does not appear in this volume as an avowed disciple of any particular philosophic school. Indeed, he seems to eschew the method peculiar to technical

¹ Vinogradoff, "Historical Jurisprudence," Parts I and II.

philosophers, viz., the dialectic development of first principles. He is too wise to try to fit the complicated legal world within the hard and narrow confines of abstract formulæ. He relies rather on the rich intuitive insights of a keen and well-informed mind, which constantly carry him to the heart of things. With extraordinary good sense he turns the lancet of judicious scepticism on the commonly accepted first principles, and reveals the diverse confused thoughts which the accepted phrases serve to cover. This he does in the interest, not of negative dogmatism, but of intellectual prudence, kindly, scrupulous and searching.

This good sense shows itself characteristically in his attitude to the doctrine of Social Evolution. He refuses to swallow the popular, but altogether unscientific, dogma that there is a "single determinate direction along which all social institutions are forever bound to go." Against evolutionary and other teleologies he wisely cautions us that men are too prone to look for a single purpose in that which is the resultant of many causes. He distrusts the type of Legal History in which the law develops dialectically out of its own concepts — the dialectic evolution made fashionable by Hegel. Law develops largely because of conditions under which it is administered, and to which it must be applied; and this truth he well illustrates by the variation of the law as to servitudes and easements of light in Mohammedan and Byzantine countries.

But precisely because he is too full of the sense of the complexity of the causes of human events, he also avoids the too simple doctrinaire form of the economic interpretation of legal history; though he rightly recognizes the fact that people generally rebel against wrongs more energetically when their own interests are affected.

Our author is also on guard against the popular Spencerian myth of a universal law of Evolution from the simple to the complex — for it is popular, doubtless, be-

cause it enables us to construct history "a priori" without the arduous labor of critical historic research. Tourtoulon puts his finger on the essential weakness of this formula as a key to history when he points out that what is simple to us may not have been so in previous times.

Equally judicious are his remarks on the relation of Law to Natural Selection. He is courageously honest in recognizing that in all forms of society the weaker are pushed to the wall and eliminated, even when they are least aware of it. "The scythe of death has the most attractive ribbons attached to it." He is as pitiless as Huxley in showing up the pious humbugs which obscurantists read into the phrase, "survival of the fittest." Survival is a physical fact, and the fitness is determined by physical factors. The moral qualities associated with such physical fitness are certainly not always desirable. Good men often do not survive, precisely because they devote themselves to causes other than their own survival. And the social qualities which make men associate for mutual aid only serve to make them more effective exterminators of the non-associated. But Law is not directly a biologic fact, and it is a mistake to stress the analogies between the biologic struggle, decided by such factors as fertility and immunity, and the social struggles which the law regulates.

Tourtoulon's method of beginning each chapter with abstract considerations may sometimes produce the appearance of a fondness for abstract and over-subtle distinctions. But the ensuing treatment in the chapter generally shows these distinctions to be weighty and important. This is especially true in the psychologic chapters. A good example is his distinction between Collective and Social Thought, — a distinction which puts us on guard against the usual uncritical assumption that the laws or resolutions of a group necessarily represent the thought of the individual members in isolation.

Against the older Rationalism, which started with the idea of man as a rational being and regarded all legal institutions as adapted to their end, there has recently arisen an Irrationalism, which finds the rational adaptation of means to ends only in the realm of the subconscious or unconscious. Here Tourtoulon treads his way with circumspection, drawing nice distinctions between desire and will, and not disdaining to notice the features of the law which make it a sport or social recreation. Man is an emotional being in his legal as well as in his other relations. Emotions as such are neither logical nor illogical, but alogical. Hence it is a fallacy to assume that all laws enacted under the influence of strong feeling, or passion, are necessarily bad. For no laws are ever made without the influence of feeling, and it is not wise to ignore this fact. The law has its roots in the affections which men have for the institutions under which they grow up. The practical consequences which Tourtoulon draws, such as the need of liberal institutions for peoples of mixed races, seem of unusual worth for American jurists. Democracies are apt to be impatient and intolerant of natural diversity, and are perhaps less likely to exercise the fine wisdom of inactivity which made the leaders of the Church of England declare (Art. 34), "It is not necessary that Traditions and Ceremonies be in all places one or utterly alike." Against unreflecting haste in seeking uniformity, and against those who regard mere "mixing" or sociability as the fount of all virtues, Tourtoulon does well to point out the necessity for protecting within proper limits the rights of natural aversion, — the right to ignore those to whose ways we are not drawn. Only by ignoring each other sufficiently, as we learn to do in large cities, can we peacefully live side by side in large numbers and still be ready to co-operate in case of need.

Against the recent tendency to replace all individual psychology by Social Psychology, and to seek in the

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latter (as does the school of Durkheim) the basis of all law, Tourtoulon has some very pertinent criticism. His conclusions judiciously indicate the truth between the social or national emphasis of Savigny and the individualism of Jhering. Lawyers may find the chapter on social psychology difficult reading; but if it does nothing else it will save them from being overawed by the pretended "science" of Social Psychology. The latter's devotees are full of pious programs and hopes, but as yet offer little substantial scientific achievement, resorting as they do to the most uncritical elaboration of material derived at second hand from unreliable sources. It would be well if the lawyer's training in sifting evidence could be applied to the evidence of folk-lore and popular anthropology at the basis of our popular social psychology.

The chapter on the *Maladies of Thought*, with its references to mythologies in law, is a new and substantial contribution to legal philosophy. It shows that many phenomena which have been the subject of elaborate rival explanations can be more readily understood in the light of the well-known weaknesses of the human mind, such as credulity, aversion to face unpleasant or rigorous truth, and so on.

Students of law will find in the chapters on the Simple Rational one of the best available treatises on juristic technique.¹ Definition, Analysis, Maxims, Analogy, Fiction, juristic "Construction," are all treated with a wealth of learning and suggestive insight. Especially valuable is the treatment of the function of Analysis in controlling legal procedure and isolating the point at issue. Students of the old forms of action and of the Anglo-American common law pleading will readily be able to extend these observations. In the treatment of Fictions, also, the remark that many fictions are due to

¹ Ehrlich's "Juristische Logik" was not available at the time this volume was written.

an aversion for saying unpleasant things, suggests how closely the fictions which are the courtesies of the law are related to other forms of social ceremonies. The reference to the rowers in Mistral's "La Reine Jeanne," who, not certain of their objective, decide to row *as if* the fairy castle were there, contains a wisdom wider than the law.

3. Tourtoulon's account of Fictions, however, leads us to place on record here a query as to the adequacy of his classification. We venture to express the opinion that it does not sufficiently discriminate the different types of fictions included under one head. In his exposition, numerous varieties — linguistic short cuts for purposes of exposition, artificial concepts or devices for purposes of simplifying the subject, verbal conventions, euphemisms, metaphors, hypothetical reasoning, and reasoning about types — are all treated under the same rubric. Moreover, we differ even more assuredly from him in declining to accept his inference that logic is not applicable to fictions, to juridical constructions, and to juridical science generally (so far as the latter is not merely a study of existing facts). This untenable (as we believe) inference (in which Tourtoulon partly accords with Géný's "Science et Technique en Droit Privé") is due to the fact that his conception of Logic does not extend beyond the traditional school Logic. At this point we offer the following considerations for the reader's comparison with the author's views.

The traditional Logic, from Aristotle to Mill, is essentially the logic of classificatory zoology and botany — the only natural sciences which these great men knew at first hand. While it is undoubtedly capable of extension, it is best fitted only for the *classification* of existing things and their inhering qualities. Tourtoulon, therefore, naturally feels that this logic is not directly applicable to fictions and legal constructions; for there we are dealing

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with the non-existing, and with questions not of truth but of fitness.

But the term Logic also denotes the *correctness of the conclusions* drawn from premises. It must not be conceded that we cannot draw valid inferences when our premises relate to questions of fitness or the adaptation of means to ends. If juristic procedure were to be ruled out from Science on that ground, we should also have to rule out a most perfect physical science like Mechanics, which (as Hertz has shown in the introduction to his "Mechanics") decides questions ultimately in terms of the fitness of a system of propositions. There are doubtless differences of degree, in the vagueness of the data, between Jurisprudence and Mechanics; but there is no fundamental difference in Logic. Perhaps Tourtoulon is, also, carried too far by his definition of Fictions as "falsehoods which deceive no one." It may be maintained that in reality the law does not assert, *e.g.* that an adopted son *is* a natural son, or that the high seas *are* in a given parish in London. What is essential is that the law grants to certain persons the same rights which it grants to natural sons, and that it applies the same rule to events at sea which it applies to events on land. It would clearly be unfortunate, practically and theoretically, if the law, after it had decided to make such extensions of its rules, should give up the effort to carry them out logically.

It is matter for regret that this wider conception of Logic as dealing with the correctness of inferences from all sorts of assumptions, whose subject matter may be conventions (as in mathematics), resolutions (as in the moral sciences), or idealizations (as in the exact physical sciences), is not yet generally available to the educated public. Some material on this theme will be found vivaciously presented in Vaihinger's recent work, "*Philosophie des Als Ob*" (a work which receives careful and

illuminating comment in Professor Tourtoulon's Appendix). Unfortunately, however, that book is, as its author admits, a work of immature youth. By trying to explain everything as fiction, making the "*make believe*" or "*as if*" cover everything, the distinctive characteristic of legal fictions and constructions is lost. But the essential unity of Logic in the physical and social sciences is there brought out, despite a woeful amount of misinformation.

4. As one who deals honestly with fundamentals, Tourtoulon cannot avoid touching on the metaphysical aspects of the law (for Metaphysics, it is well to be reminded, is but the obstinate effort to think clearly as far as the human mind can go). This he does more specifically in the chapters on "Pure" Law and on Metaphysical Law.

In these chapters Tourtoulon shows himself profoundly influenced, not only by Gény and by his own colleague Roguin, but even more so by the Neo-Kantian metaphysics of Stammler, as expounded by his disciples Djuvara and Reinach. But while our author thus persistently asserts the existence of "*a priori*" elements in the law, he also keeps to the old positivistic assumption that logic and scientific demonstration can deal only with empirical facts of existence. This places his metaphysical doctrines of "Pure Law" and Justice in the anomalous position of being logically indemonstrable, and yet categorically necessary.

It is Professor Tourtoulon's respect for Kant and for the transcendental philosophy which here leads him to support a good deal of genuine and profound insight by arguments that students of modern logic and mathematics believe to be obsolete and untenable. A careful analysis is necessary to disengage what is sound from what is, in our opinion, unsound in his position. We permit ourselves here a few words in explanation of the foregoing comment:

Kant wrote at a time when people thought they knew with absolute certainty that space must follow the laws

of three-dimensional Euclidean geometry. This certainty (as Kant clearly saw) could rest only on "a priori" intuition. The later development of non-Euclidean geometry, however, has clearly shown that this absolute certainty, or "à priori" intuition, is a delusion, — that in fact we have no means of asserting in advance of experience what system of geometry nature will actually follow. The realization that the axioms of our most perfect science, Euclidean Geometry, are not categorically certain, but are rather only convenient hypotheses, inevitably makes us distrust all propositions claimed to be categorically true, intuitively certain, or self-evident. This distrust is naturally more justified in the variable realm of Law. Tourtoulon frequently argues that just as all the facts of arithmetic presuppose the category of quantity as "a priori," so do the facts of Law presuppose certain categories. This argument, as we view it, breaks down when we see modern arithmetic developed without presupposing the category of quantity at all. Indeed all the Kantian epistemologic arguments from facts to the certainty of their presuppositions simply illustrate the logical fallacy of arguing from the affirmation of the consequences. All our presuppositions are really only hypotheses to explain the facts, and the certainty of the facts (if they are certain) may confirm but cannot prove the hypotheses which explain them.

Yet, despite all this, there is a large share of truth in Tourtoulon's assertion that there *are* certain elements of the law logically prior to, or independent of, the empirical existence of human life. This truth can readily be recognized if we clearly distinguish between principles of procedure and substantive principles. That which substantially exists in natural time and space is essentially changeable, and one can never have any absolute knowledge of what is past or future. But when we examine the principles of procedure of all sciences, we find certain in-

variant relations between all premises and their consequences. These principles of logic we do not create. We find them. But without them no valid argument as to anything actual or possible can be constructed. Now the principles according to which all conclusions follow from their assumed premises do not change with time, for the simple reason that it is meaningless to speak of abstract relations existing in time. (Abstract relations can only be said to exist logically, if we mean by this simply to assert their universal validity for all possible arguments.) To the extent, then, that Law necessarily depends on Logic for its elaboration, Professor Tourtoulon is in our opinion perfectly correct in insisting that the logical element of Law is independent of any human institution. For it would be absurd to try to derive or prove the principles of Logic from the instances in which they are embodied. To claim validity, every such demonstration would have to assume the very principles it tried to prove. But these logical principles are negative and regulative; they do not determine the matter or particular premises of any one science, precisely because they are the regulating principles of all sciences.

Our view of the author's position may perhaps be rendered a little plainer by considering the two stages of his argument, which we may refer to as (a) the stage of Roguin, and (b) the stage of Reinach.

(a) Roguin has insisted that some elements are necessarily found in all legal systems actual or possible. This is obviously a matter of definition. If by "legal system" we mean anything at all, we mean some set of relations. It follows, then, that every legal system will be subject to the logical rules according to which these elements can possibly be combined. If you encounter a system in which these elements do not exist, it will *by definition* not be a legal system at all. Such an abstract development of legal logic possesses (as Roguin and Tourtoulon have

indicated) great usefulness as an auxiliary science.¹ It opens up the field of possible solutions to concrete legal problems, and thus saves us from falling into the natural dogmatic assumption that any particular solution which happens to occur to us is the only possible one. When, however, this abstract, or "pure" law is used by itself apart from a full appreciation of the complex actual or historic facts, it is apt to produce the very opposite effect of closing our minds to the concrete possibilities before us. This is amply illustrated by judges or jurists who in their anxiety to be rigorously logical fall into the vice of false simplicity which Jhering has called "*Begriffsjurisprudenz*," and Pound, "*Mechanical Jurisprudence*."

(b) Reinach's "*Die A Priorische Grundlagen des Bürgerlichen Rechts*" appeared originally in Husserl's *Jahrbuch*. As Tourtoulon's reference to Husserl's philosophy is very brief, a few remarks about it may be in order. The philosophy of Husserl, following that of Meinong, is rooted in an insight of the inadequacy of the old positivistic logic which assumed that logical demonstration is concerned only with what actually exists. As the life of all mathematical or theoretic sciences consists in the development of the consequences of rival hypotheses (which development is necessary before we can conceive of crucial experiments to decide the rival claims), and as contrary hypotheses cannot all be true, it follows that a great deal of the life of science consists in developing the consequences of hypotheses, irrespective of whether these hypotheses are true or not. Moreover, in sciences like mechanics or thermodynamics, our reasoning proceeds from assumptions as to free bodies or frictionless engines, though such bodies cannot possibly exist in nature. This means that there is a scientific point of view from which

¹ Admirable work along this line has been done by Bierling and Binding in Germany, and by Pound and Kocourek and the lamented Hohfeld in this country

hypotheses or assumptions have logical characteristics, apart from the question whether their subject matter has actual existence.

This enlargement of the conception of valid Logic has many important applications to juristic study. For one thing, it renders nugatory the positivistic ideal of juristic science as dealing only with *what is*. It shows us that a science of what ought to be, of desirable or just law, may be logically as rigorous as mathematics. It also enables us to dispense with Géný's artificial and misleading distinction between "science" and "technique" in law, since it shows that science is itself a technique, and that no technique can dispense with logic in its elaboration.

Unfortunately, however, Reinach's own study seems far more influenced by the traditional Kantian conceptions "a priori" than by the newer logical philosophies. He is not satisfied to maintain merely that Law must be subject to the regulative principles of logic, but seeks to establish substantive legal principles, "a priori," going as far as to maintain, *e.g.* that the obligation to keep promises is "a priori" necessary for all legal systems — a proposition which is not only far from necessary, but actually false. No known legal system makes all promises legally obligatory. The distinction between those which are and those which are not so obligatory clearly depends on empirical elements. Similar considerations hold with regard to Professor Tourtoulon's attempt to establish as "a priori" the distinction between private and public law, or the distinction between rights over animate and rights over inanimate objects. We can no more deduce material generalizations or distinctions from the formula or regulative principles of logic alone than we can get a house by merely manipulating the rules of architecture.

5. These abstract considerations will also assist us to pronounce in what respect our author's theory of Justice is tenable and in what respect untenable.

To define Justice as "the according to each that which is his own or his due" ("suum cuique tribuere") might seem at first perfectly futile. Tourtoulon's example of Talmudic casuistry, in reference to the ownership of a house, shows how slippery is the question, What *is* a man's own? Indeed, it is the very object of a theory of Justice to define what is justly a man's own. To assert that everyone is justly entitled to keep whatever he actually possesses would be a monstrous perversion of what has generally been meant by Justice. A number of attempts have been made to avoid this difficulty; but they have not succeeded. Thus it is urged, that in virtue of being the first occupant, Robinson Crusoe is justly the owner of his island. It is "his." But it is by no means self-evident that it is just for him to exclude other persons subsequently shipwrecked upon the island, even if all the available food on the island were the result of his own labor. If the poor, weak, or helpless have a just right to life, others cannot have a just right to exclude them from the means of maintaining life. The doctrine that each is entitled to the full produce of his labor is, as an absolute proposition, untenable. Another example is the claim that a man's personality is his by nature, and that no one has a right to interfere with it; whence it is concluded that slavery is always and absolutely unjust. But here again we are apt to be misled by words. If slavery denotes an unjustifiable interference with personality, it is obviously unjust *by definition*. But to say that all interference with personality is unjust, even for the purpose of correction, or of preventing harm, is to make justice absolutely useless for the legal regulation of society, since all law involves some interference.

Professor Tourtoulon has the courage of his convictions and recognizes that the justice which he defines as the "suum cuique" *may not* be desirable or good. But if so, why should we ever follow Justice at all? He an-

swers that Justice is not a principle of action, but of evaluation. Yet is not this still clearly inconsistent with the sharp distinction between justice and the good or desirable? How can we evaluate except in terms of the good and the better?

Nevertheless, our author's doctrine of Justice covers a great deal of shrewd wisdom having fundamental validity and importance. Whatever characteristics a legal system may have, it must (so long as legality means what it actually does mean to all people) include lawfulness, or the regulation of conduct by general rules or principles. Legal Justice then means that laws should be kept, — that we cannot have a law and yet avoid it by exceptions in special cases. Equality before the law, or the impartiality of the judge, amounts to just this faithfulness or respect for the law that is. "*Suum cuique*" means that, if the proper legal authority has awarded a disputed property to my neighbor, I should obey that decision even if I consider it unjust. This principle to be sure cannot be absolute. There are times when the actual legal order is so monstrously unjust that patriotic citizens must rebel. This, however, in no way denies that, other things being equal, lawfulness or legal order is a great human good, and for the maintenance of it men at all times are willing to endure a great deal of material injustice.

The formalist sometimes reaches the same result by the following dialectic argument: It is absolutely or categorically necessary for every legal system to maintain legality and that which supports it; for the legislator cannot possibly issue a decree or command that there should be no law. Unfortunately, however, legislatures sometimes actually do illogical things. Thus for many years there was a law on the statute books of New York, purporting (in accordance with the provision of the State constitution) to prohibit and prevent gambling at the race tracks. Yet the actual effect of the law was to protect the "book-

makers," or public gamblers. It required a long and bitter struggle, led by Governor (afterwards Justice) Hughes, before the repeal of that infamous law could be secured. This illustration may suggest the danger of applying the terms of absolute logical possibility or impossibility to human relations such as those of the law.

In order to maintain his metaphysical conception of Justice, Professor Tourtoulon argues that men could not pursue the ideal of Justice if it were empirical or arose in our own nature. To this the answer might be made that only the ideals that arise in our own nature can be pursued at all. Certainly bread, or the welfare of our children, is no less desirable because hunger or parental affection arises in our own nature.

In thus venturing to submit our author's metaphysical doctrines of "Pure Law" and Justice to a critical scrutiny, we only follow and apply the candid, critical spirit which he himself so admirably illustrates throughout this book, and more especially in his criticism of the positivist's attempts to derive rules as to what *ought to be* either from the accumulation of past facts, or from the "social nature" of man. The attempt to derive concrete or particular consequences from metaphysical assumptions alone is an impracticable one, since modern logic has shown that from universal premises alone no particular conclusion can be drawn. For true universals are hypotheses, and from no accumulation of assumptions alone can we derive a fact.

6. If the reader ask, Why labor at this arid topic? the answer is that only by refuting, or at least mitigating, the claim of metaphysical absoluteness put forth in the theory of "Pure Law" and Justice, can we fully justify the profound and mature wisdom which Professor Tourtoulon elsewhere shows throughout this volume, — the wisdom of moderation. This spirit of moderation is what lawyers are apt to have developed in them by the very prac-

tice of their profession; but they are apt to forget it when they come to formulate their views theoretically. The religious reformer can aim to make men perfect. Having the absolute truth revealed to him, he knows both the absolute goal and the necessary means. Not so those who deal with laws, which are always based on more or less rough estimates as to the general future effects of measures designed to meet, not the needs of everyone, but only those of the generality. Logical rigor in juridical thinking is, doubtless, a great good. As our author acutely remarks, those (especially theorists) who vaguely appeal to life or practice generally show that they have not the stamina to follow arguments rigorously to their logical conclusions. But the principles of law cannot extend beyond the law which is their field of application.

For we must remember that not the whole of life can be legally regulated, and that the supreme virtue of the law, Justice, must frequently yield to the more humane virtue of Charity. Those who care for pompous rhetoric may repeat that law is nothing but justice, reason, and so on. They may even find satisfaction in such banal cant as that law protects liberty but not license. But an honest jurist like Tourtoulon knows that "to define liberty as the power to do only what is right is like defining a franc as a piece of money to be given to the poor."

The lawyer, like the physician, sees the shadows as well as the lights of human life; and, if wise, he learns not to expect too much of the law, and to be tolerant of human imperfection. Such a sense of imperfection and spirit of tolerance is one of the best safeguards against the spirit of fanaticism which uses rigorous principles to shut the gates of mercy on mankind. No single aphorism so well sums up this viable attitude of the lawyer as our author's dictum: "There is no need to throw to the dogs all that is not fit for the altar of the gods."

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It remains to add a few words about the present translation. One who reads the book will realize the wide learning required for translating it. But only one who has compared page after page of this translation with the original text can realize to what a remarkable extent Miss Read has successfully combined great faithfulness to the original with idiomatic fluency in the rendering. The editor has gone over the entire text carefully in order to guard against the few inevitable slips and ambiguities and to bring the terminology into greater harmony at certain points with current usage in philosophy and jurisprudence. To enable the size of this volume to meet the required format of this Series, it was necessary to omit the very interesting body of illustrative quotations that the author appended to almost every chapter of the original. For the same reason it was necessary to omit a few introductory sections in the chapter on Races (Book II, Chap. IV) and in the chapter on Law and Emotional Life (Book II, Chap. VIII). The temptation to add explanatory notes has been overcome in all but very few instances, which are indicated in square brackets.

INTRODUCTION TO THIS VOLUME

BY ANDREW A. BRUCE¹

When asked to define the word "Professor" a small boy replied: "They are of three kinds; one of them teaches dancing; one of them teaches swimming; and one of them goes up in a balloon."

To many a practising lawyer the modern law professor belongs to the third variety, and especially does he who essays to be a philosopher. In the eyes of the public, all philosophers are metaphysicians, and the metaphysician is in popular disfavor. A Scotchman once suggested that "when a mon who dinna ken, taks aboot that which he canna comprehend, to a mon who doesna understand, then, Sir, that is Metaphysics"; and the man in the street is apt to agree with him.

But the theorist of today is often the practical man of tomorrow. The balloon developed into the aeroplane. All philosophers and thinkers are not metaphysicians; some metaphysicians have at least human intelligence; and some philosophers and metaphysicians can talk so that the layman can understand.

To this chosen few de Tourtoulon belongs. He at least seems to understand. He at least makes us believe that *we* understand. He makes it clear that back of the concrete practical law is the abstract ideal, and the philosophic concept; and that, though the legislative body which enacts a statute, or the judge who enforces it and gives to it its legal sanction, may not always understand,

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it is a belief in the understanding of others that leads to the enactment. He shows us how necessary to true legal history is a recital of the prenatal philosophy and the philosophy of the creative act and an understanding of the psychology of legislative and judicial lawmaking; and in a number of instances, and in an illuminating manner, he shows us what that philosophy and psychology were and ever will be.

Though the work of a philosopher, the book is perhaps one of the most practical of those which have been written in these modern times. We are today, in America, in the midst of a social revolution; we are questioning the very foundations of government. Should we or should we not have a pure democracy? Can there be a pure democracy and real progress? Many decry the following of precedents; but how far have precedents been followed in the past, and what is their value? Is the legal fiction a thing of value or a thing to be discredited? Wherein does the strength of the demagogue lie, and how far has the advocate affected the development of the law? These and a hundred other questions are answered — not directly, it is true, for the author is only undertaking to show that the historian should take account of the influence of philosophy and of the philosophers, — but to the thoughtful reader they are answered none the less.

✓ The real lawyer and statesman desires that government by law shall remain among us. In order that it may remain, that law must be responsive to the needs of the age. It must satisfy the wants, even the whims, of a democracy, yet it must be fundamentally sane and, above all, it must be stable and secure. Though additions are to be built, the main structure must be preserved. If one legislates he should know what now is, and the reason of that which has been formulated and proclaimed: he should know not only the facts which brought about the enactment or the proclamation, but the philosophy and the psychology

which made the need apparent and the need communicable. "We are neither children nor gods, but men in a world of men." What have men deemed to be necessary for men? What has induced that belief? And how was the belief communicated? Today, how can we make an unthinking democracy think? How can the thinking few dominate legislation? What are we driving at? What is the real domain and scope of the law?

All these questions must be answered and must be solved. In their solution Professor de Tourtoulon has given us material aid. Supposedly, the author is merely giving hints to the historian. In fact, and as he himself asserts, he is attempting "to trace what constitutes, in my opinion, the philosophic principles of the history of the law; the analysis of the psychological phenomena, which taken as a whole constitute law; and the examination of the mechanism which causes them to succeed one another and be combined in a relatively undetermined manner that can and should be studied minutely in itself." If today we would legislate, if today we would formulate and preserve a judicial system and a law that shall be adequate to our needs, we must understand these things.

It is not the province of this introduction to review the work that is before us. In these days of an attempt at a pure democracy, however, few will doubt the value of the careful study of suggestions such as these:

"The privileged few can express what they think, can make their speech or their writings understood, and transmit them to succeeding generations . . ."

"What is thought in the group, in the nation, or in humanity, does not constitute social thought. The whole intellectual labor of human beings does not become synthesized, nor does it create law, religion, or any social phenomenon. It is a real thing which cannot be perceived, a sacred thing which we cannot respect since we cannot know it. On the contrary, collective thought

(that of groups) is easy to observe, it is a convenient object of study, thanks to its relative meagreness. In fact, it governs the world, but nothing can give it a right to do so or compel us to accord it our respect and esteem. It is a concubine that cannot be driven from the conjugal abode . . . ”

“The Durkheim school supposes that the social consciousness is formed by mysterious processes in a political group, or in some definite region, whenever assemblies, crowds, or writings give it the opportunity to reveal itself. I maintain, on the other hand, that every event, every institution which brings many brains into contact, itself transforms scattered and uncertain fragments of individual psychology, so that before the communication of ideas has been materially affected there exists nothing specifically collective. What will be the general spirit of a particular assembly? That will depend upon its powers, upon the task it has to accomplish, upon the way in which the president and the board will be nominated, upon the duration of its powers and upon the one who will address the house. It becomes a collective being by contact, and before the first contact, it does not exist . . . ”

“Every time that men meet directly, or communicate by writing, there is an exchange of ideas, new or commonplace, practical or visionary. Among these exchange ideas, some are common to all or appear to be so. The adherence of each individual to these ideas communicates to them a new force, and they return to the brain of each no longer with the timidity with which they might formerly have been affected, but with quite peculiar intensity. What has been energetically affirmed and has not been contradicted appears incontestable . . . ”

“If we try to imagine the first act of social repression, the first time that a group might have exercised penal justice, before the first contact of individual brains, there would have existed nothing collective in their minds. This

first popular tribunal would have been essentially irresolute, open to every fluctuation of sentiment, and might equally as well acquit the criminal as tear him to pieces, by the least chance incident. After this first decision, this first decision of collective psychology, the memory of this former phenomenon would remain in the minds of the people and consequently there would be a tendency to repeat it. This tendency is originally of small moment, but it would necessarily assume more stability through repetition . . . Collective psychology establishes itself in tradition and in judicial decision . . . ”

“Great orators specialize in controlling collective thought. Demosthenes and Cicero are remarkable in this respect . . . ” (The writer might add to this list William Jennings Bryan, Eugene Debs, and A. C. Townley.)

“The isolated man to whom a course of reasoning is submitted remains in doubt if he does not find the reasoning itself the means of justifying his belief. But if he becomes part of a crowd, he is less particular; although he may not understand a thing very well, if everybody else has an air of understanding it, he is easily convinced. It may thus happen that nobody in the crowd fully understands a certain question, but as everyone supposes his neighbor possesses more perspicacity than himself, the approval is unanimous.”

Though to some Pierre de Tourtoulon may appear to be a professor in the clouds, and philosophy a useless abstraction, to the writer the author is a practical politician, and philosophy is a live and up-to-date science.

AUTHOR'S ORIGINAL PREFACE

The work which is now completed was originally conceived as merely a preface to a Manual of Legal History. The various circumstances which for a long time prevented its being shaped into final form and printed have modified to a considerable extent this first point of view. Thus I gave up the idea of treating in this work — reserving that for later volumes — questions of practical, didactic or pedagogical interest. This would have been out of place in a work intended to be purely philosophical.

The rôle of legal history in the juridical and historical sciences is purely a matter of opportunism and does not admit of being clearly determined. Everything that concerns method also eludes any precise rules. Except for certain broad principles which are imposed upon all, method is a personal thing. Just as the objective study of methods already employed is of profoundly practical interest, so the elaboration of the method which should be employed, the ideal method, is entirely visionary. In no case have these two matters any philosophical character.

So I have attempted to trace what constitutes, in my opinion, the philosophic principles of the history of law: the analysis of the psychological phenomena which, taken as a whole, constitute law; and the examination of the mechanism which causes them to succeed one another and be combined in a relatively undetermined manner that can and should be studied minutely in itself.

This work is only an outline; its chief merit being perhaps that it emphasizes the complexity of a problem

which certain writers have tried to solve in far too simple a fashion.

"In brief, the principal merit of the book consists in its maintenance of a point of view and its statement of problems that at first sight appear to have no relation to the History of Law, — an opinion that is reversed by the long and careful critique made by the author."

Thus the eminent scholar, Professor D. Gumersindo de Azcárate of Madrid, expresses himself in a letter-preface to the Spanish translation of my first volume. This great thinker and brilliant orator did me the very great honor of criticizing that first volume and of bringing to it an appreciation of which I have reason to be very proud:

"And it is not that I agree with all the doctrines of the author, as you see; but that which delights me in his work is its scientific exactness, its originality, its erudition, its impartiality that is above any spirit of sectarianism, and its undoubted importance."

I dare not think but that this appreciation is far too indulgent. Of these eulogies I will accept, however, that of impartiality free from all sectarianism. Sectarianism is certainly not my forte. I believe that I am almost free from any preconceived ideas. Independence of mind, however, even in one who desires it most utterly, is perhaps never more than relative.

I owe the heartiest thanks to M. Ramón Carande, the young scholar of Madrid, already deeply versed in the juridical and economic sciences, who took the initiative in the Spanish translation and conducted it to a speedy and successful conclusion.

Professor Wigmore of the Northwestern University Law School has been good enough to offer me, in the name of the Committee of the Association of American Law Schools, a place in the collection of English translations of continental works upon legal philosophy. This is an honor

which it would be difficult for me to refuse, although I may cut but a poor figure in the company of the jurists who have thus chosen me, and of those celebrities who have been comprised in their collection.

It would be difficult to express in mere words of thanks all my feelings of gratitude toward those who, in addition to the exceptional honor accorded me, have procured for me the advantage of being able to be read in the two most widespread languages in the world.

Renens, near Lausanne,
November, 1918.

AUTHOR'S PREFACE TO THE AMERICAN EDITION

This opportunity to write a special preface to this edition, availed of at the suggestion of those who have introduced my book to Anglo-American lawyers, gives me a special satisfaction.

Nearly a year has elapsed since the appearance of the French edition, a year in which intellectual life has become somewhat more active, the post more accommodating, and commerce in books more diligent. In consequence of this, I have been able to read and study a number of works, some of which were published in the year 1919, and some others published abroad of which I had only imperfect knowledge. On the other hand, various scholars, among them those whom I highly respect and esteem, have read my book and made me acquainted with their views either in letters or in the form of book reviews. Putting aside eulogy inspired by indulgence or friendship, these expressions of opinion have given me some objective indications of the utility of my efforts and of their concordance, in the main, with the trends followed by others.

But I have not yet felt the need of making any modifications of great importance in my book; and I am happy on this occasion to be able to justify my efforts by analogous labors of very eminent thinkers, and to turn again to a body of ideas involving various questions of juristic logic which seem to me to be of very particular importance. For the rest, I defer my remarks on the detail of these matters to an appendix to this American edition of my book.

lii AUTHOR'S PREFACE, AMERICAN EDITION

Ought I to make excuses for the book itself, in that its themes may be thought to be too detached from the pre-occupations of the present hour? "Primum vivere, deinde philosophari" runs a proverb of good sense, which nevertheless may involve a great error of history and of psychology. What becomes of philosophy if man does not have it except in the hours of calm and tranquillity? What of human reason if it can not exist as well in a time of material anxiety as in a world of abstract thought? Man has always philosophized, and he will speculate on the uncertainties of the future. However, it is our hope that the future will be one in which the beneficent influence of the United States of America will bring moral and intellectual good to all.

PIERRE DE TOURTOULON.

Renens, near Lausanne, 26 January 1919.

PHILOSOPHY IN THE
DEVELOPMENT OF LAW

INTRODUCTORY CHAPTER

OBJECT AND SCOPE OF THIS WORK

As a rule, treatises on the history of law devote a part of their introductions to pointing out the philosophical and practical aspects of this science, its characteristics, its methods and the place it should occupy in the field of human knowledge. But such information is nearly always superficial and devoid of originality. The historian is in haste to do historical work; to ask that he reflect upon the usefulness of his work is as little to the point as to question a passer-by on the street upon the *raison d'être* of his existence. Let us allow the latter to go to his business, the former to his documents.

The opposite fault will be found in this volume. A great many theories, a few facts, and some persons will, no doubt, ask whether it is necessary to discuss so much, before undertaking a Juristic History of Modern Europe.

When first I began teaching at Lausanne, I was struck by the profoundly philosophical character which my predecessor, M. Brocher de la Fléchère, was able to give to his course in the history of law. Few minds have dwelt at such length upon the principles of our science, and upon its scientific, didactic, and practical importance. I do not wish by any means to screen myself behind his authority, for it may be that I have met with but poor success in those provinces familiar to him. I may say, however, that if I had not known him, my brief preface to a manual of legal history would never have developed into the present volume.

If the history of law is merely an instrument in the hands of some other science, such as sociology, psychol-

ogy, general history, or philosophy of history, I confess myself wrong in quitting my own trade and daring to undertake that of another; but if it is an individual and independent science, everything that pertains to it, pertains to us. It seems to me that we cannot merely hand on our materials to others for them to make the philosophical deductions, since the method of research should be determined by what we wish to discover, and to follow the texts without aim or method would not, perhaps, accomplish any great object.

Philosophy may hope to learn from our science the attitude of history in relation to law, and that of law in relation to history. We can gain a more definite idea of the nature of law by studying it through the ages. We shall discover just what degree of stability it is possible for juristic conceptions to attain; what forces tend to transform them and how the transformations are effected. The nature of every abstract or concrete thing reveals itself to him who observes its movements, to him who can determine the degree to which these movements are of its own initiative or are produced by outside forces. On the other hand, by tracing back to their rudimentary state the elements of the complex laws of civilized peoples, we shall be better prepared to analyze them and place an estimate upon their value. Such must be our first task, a contribution to the philosophy of law, that is, to general philosophy.

Reciprocally, the study of the transformations of the law ought to clarify the philosophy of history. Without doubt, the history of every science and every art is equally necessary to explain the development of the human mind and of civilization. The historians of mathematics, of physics, of medicine, and of painting, contribute to the reconstruction of the life of the past, and to the understanding of the course of human thought and human society. But we should be greatly deceived

if we considered universal history as the sum of the histories of particular subjects. Each of these possesses distinct peculiarities, and a power of explanation more or less profound or extensive. One will be of value on account of its objectivity, another, as the history of philosophy, because of the importance of its ideas. What has law, theoretical and practical, done for humanity? What part of the thought of a people do its institutions represent to us? Is law active or passive in its evolution? Does it permit itself to be modified by different causes, or does it act as a cause itself? What is the force of that action? The historian and not the jurist is directly interested in such questions.

We shall pursue them, moreover, a long time without solving them definitively, for if they were solved, the historian-jurist would no longer have a philosophical task; his work would become purely descriptive and he would find himself excluded from the realm of general science. We have stated them, in a very imperfect fashion to be sure, in order to show that there exists a science of the history of law which springs from the study of documents and from the interpretation of institutions of the past, and has for its purpose not simply the substantiation of certain facts, but the attainment of some portion of general and abstract scientific truth.

We are not going, as some do, to ask our principles from some other science. But we shall ask the aid of many other sciences—biology, psychology, sociology; at the same time, however, taking care to borrow from each only what is strictly useful to us, always keeping in mind the special point of view of the history of law, and avoiding every discussion which does not bear directly upon that subject. We shall endeavor to make clear the essentially analytical character of our work, a work which has been careful at all times to separate our branch of the study from all those which flourish beside it, and not to

merge it in them. It has not, however, been our object, by any means, to prepare or to facilitate a synthesis of the social sciences. Quite the contrary. The scientific rôle of legal history must not make us neglect its practical rôle. One may be a great painter, an excellent physician or a learned mathematician, and yet be completely ignorant of the history of mathematics, of medicine or of painting. Is it equally allowable for the legislator and the lawyer to be ignorant of the history of law? In other words, is history an essential element of legislative and juristic work?

Whenever a problem of a desirable law is discussed, two opposing tendencies nearly always present themselves, that of the rationalists and that of the traditionalists. The former search for a rule of conduct in reason, in logic, in the "a priori"; a certain provision of the law appears to them useless or ridiculous, and they demand its suppression. They are quite certain that nothing more than a little reflection is needed to discover the good and the evil. Their efforts towards reaching the political conscience are praiseworthy; but they are so fruitless, so superficial, so artificial, that passions and interests sport with their theories as with bits of straw; and the result is that although they desire that reason should displace arbitrary provisions, reason is, in the end, displaced by arbitrariness.

The traditionalist is more prudent; it is his principle not to deviate from his habits, but to adhere to what he has seen work. He will not commit the grave faults of his adversary. There will always be in the traditionalist's solution a certain equilibrium of reason, interest and sentiment. But he would condemn the law to absolute immobility. Furthermore, his intellectual attitude is too passive. From the day when man reasoned about his institutions, even though the reasoning was childish, a change was effected. In spite of its errors, rationalism is,

perhaps, only a passing evil; let us hope that it will become an ultimate good.

It is not difficult to see that history, the experience of the past, reconciles these two theories and will certainly become the only method of the future. But do we actually know enough history to evolve from it a certain legislative method? Frankly, no. Materials are not lacking; but the means of availing ourselves of them are entirely inadequate. The history of law cannot assume the responsibility of furnishing ready-made solutions to the law maker. It can only claim, among several legislative methods equally defective, to take its place with the same right as the others.

And what has the interpreter of the laws, the lawyer, to do with the history of the law? That depends. The law, in so far as it is a science interpretative of laws or statutes, is essentially of little stability. One can scarcely give it a thorough definition which would be applicable in every age and environment.

In lower societies, law is a preservative instinct of the individual and of the race; its application is unconscious. For others of a higher order, belief in the value of customs is religious, and their observation is assured through the medium of authority. Thus is awakened the moral appreciation of the law and the idea of employing it to repress vice and develop virtue.

Finally, higher civilizations arrive at a juristic consciousness. The interpreter of laws equalizes interests by a special technic which is independent of common sense and of public morality and is able to bring about different results. Such procedure may end in assuming an almost mathematical rigidity. Ancient Roman civilization contributed much to form this juridical mind among modern European peoples. The latter are apparently not quite satisfied with it, and the indefiniteness of the idea of law is strikingly illustrated at the present time. To

the detriment of those who wish to preserve intact the formal Roman law, there is daily gaining ground a school which substitutes for it moral interpretation, or the sentiment of solidarity; confidence in progress replaces the cold deduction of our ancient jurisprudence. These humanitarian tendencies must not be confounded with equally recent efforts to consider the law from an objective and positive point of view, by relying on all the data of science that are certain and available. This new school, which is moreover still in its infancy, might be called philosophical in that it tends to reconcile the solutions of practice with the positive realities contained in legal formulas.

History of the law is far from having the same importance for the three schools. For the first two, it is not superfluous, but it is only accessory. One may deal with the technic of the law with the greatest finesse, the most inflexible precision, and yet ignore the first elements of its history. It is possible, though with more difficulty, to evolve some happy and even opportune ideas for the interpretation of laws while despising our science altogether. On the other hand, the philosopher-jurist bases his method upon historical observation and without it he could do nothing. The law, then, has not that absolute immobility which the mathematician demands in order to establish sound deductions, nor that relative immobility necessary to the neotheologian to present his opinions as a product of the universal conscience. For the philosopher the law is what it is, — something mobile and relative, whose present can be explained only by its past, — something which endures continually, in each of its precepts, the attacks of different interests, and opposes to them a force of resistance that is not always the same and which it would be dangerous in practice to consider as absolute.

From a theoretical and a practical point of view, let us

investigate first of all for what reason, by what means, and in what way law is modified by time. We shall then be able to state more precisely what the study of these changes can contribute to legal and historical science, that is to say, what is the rôle of the history of law. Finally, in a third part, we shall try to establish a method that is in conformity with this rôle and that presents sufficient guarantee of scientific accuracy

PHILOSOPHY IN
THE DEVELOPMENT OF LAW

PART I
CHANGES IN THE LAW

INTRODUCTION

§ 1. *The Three Schools of Thought as to Changes in the Law.* The incessant modifications of the law form the subject matter of legal history. But those who ascertain and study the perpetual movement of institutions, find themselves, according to their temperaments or their observations, in very different states of mind. Consciously or unconsciously, they have themselves created some kind of philosophy in regard to historical development. In fact, each historian has his own. But the various systems may be classified in three great schools.

(1) For some, there is no connection between the moral and the physical sciences. The former have a high destiny and escape universal causality. That which makes humanity advance in the path of civilization and progress, is not the combination of small circumstances which surround it, but the rôle which has been assigned to it, or which it assigns to itself, the end which should crown the work. There are some mystics and some practical men (*positifs*) in this school. The former believe in the interposition of a metaphysical will which is superior to man and has marked out his course for him: the latter only pre-suppose the existence of the human will, but they do not think that a reasonable being capable of choosing an aim and of directing himself toward it, is subjected to the rigorous mechanism which directs inanimate objects. They are all teleologists in the sense that attraction towards a given end is for them the true explanation of human acts and human institutions.

(2) Diametrically opposed are the theories of the determinist. To him the human will seems an illusion, a product of irrelevant causes, without action and without

influence. Our institutions are determined by permanent forces which draw us into inevitable paths. But what characterizes this school more particularly is the belief in laws of history. By retracing the course of the legal progress of the past, we might, they believe, render apparent the direction that the human intellect has of necessity followed and must of necessity follow in the future. They go so far as to assert that the research into laws is the only scientific task of history. A great many and inherently different laws have been discovered: biologic laws of selection and association, the anthropologic law of the mixture of races, the psychologic law of imitation, the economic law of interest, and the political law of progressive centralization. Our modern systems are not lacking in these guiding threads by whose aid universal history may without difficulty be unravelled.

(3) Finally, I shall call the causalist school that which confines itself to studying the cause of each institution without believing in the possibility of evolving its laws. The factors which contribute to the establishment of the Law are innumerable, and it is impossible to treat some as essential and others as accidental. The Law originates and is modified under physical, biological, economic, psychological, and juristic influences. The co-existence of these forces proves that no single one of them can be the sole guide of history; no single one can acquire the fixed and determined character which would permit it to assume the title of a law of nature.

We have adopted these last views. The following chapters explain why.

BOOK I

TELEOLOGY IN THE HISTORY OF LAW

Are human institutions *willed* in their creation or in their modifications? Are they willed *by man*, or by a force superior to humanity, by God?

These two questions do not appear, at first sight, difficult to solve. What are laws if not the product of the human will? As to the intervention of the divine will, one is free to believe it by an act of religious faith. But it cannot be considered in a scientific work.

Nevertheless, neither of these two questions is as simple as it seems. In fact, it must be observed in regard to the first that we need not ask ourselves whether the law is the product of the human will; but whether man when he created his institutions, foresaw their functions, whether he adapted them to the purpose that he intended, and whether he knew before he made them what their rôle would be. Now, we shall have occasion to show that man foresees the results of his acts to only the most limited extent. He no doubt assigns imagined functions to the law which he frames. But as to the true functions, how can he know them beforehand when he does not recognize them afterwards? Man has only a very vague idea of the advantages and disadvantages of institutions which he sees performing their functions before his very eyes. Is it credible that he understood them before they were adopted?

As to the second question, which we shall call that of metaphysical teleogism, we have willingly given it the form where its theological character is most apparent.

But it is easy to disguise behind words what the materialist and even the positivist is accustomed to respect; and to do this without changing its meaning.

Instead of God, let us say Nature. Let us speak of that force which all living matter shares, and attribute to the material atom a virtue of initiative which resembles, more or less, a soul. It will possibly appear then, to certain minds, more scientific to ask whether this tendency to produce life is not the directing force of institutions, and if it is not that to which we should confide our destiny. By these changes of words have we departed from theology? Have we entered science? That is what we mean to investigate.

CHAPTER I

METAPHYSICAL TELEOLOGY

§1. INTRODUCTION.—§2. THE FINAL CAUSE IN BIOLOGY.—
§3. TELEOGISM IN PSYCHOLOGY.—§4. TELEOGISM AND MORAL-
ITY.—§5. TELEOGISM IN LAW AND IN POLITICS.—§6. TELEOGISM
IN HISTORY.—§7. TELEOGISM AND LEGAL DEVELOPMENT.—§8.
CONCLUSION

§ 1. *Aims and Forces.* Teleology is all the more dangerous in that it is less a philosophical theory than a natural tendency of the human mind. We pass in and out of this doctrine unconsciously; we are all the more enslaved by it when we believe ourselves free from it. Those who condemn it do not always understand very clearly why, and for what precise reason it is irreconcilable with positive science.

The old theology, in its interpretation of Nature, exhibited an especially vicious teleology. Man was the center of creation; everything had been made, by God, to be useful to man. And that God, the creating and directing force of the universe, was conceived in the image of human psychology. A will gauged by our will was attributed to Him with plans analogous to those we form, with a foresight and action similar to the foresight and action of man. Anthropocentrism and anthropomorphism were the two faults of the old teleology, and contributed much toward bringing it into disrepute.

But these are only minor defects. One reason alone—the same for all the sciences—makes us discard these theories. The idea of an “end,” and “aim,” involves the further idea of a consciousness capable of foreseeing the results of an act. Now, whatever its nature, it must al-

ways remain inaccessible to our investigation. That this consciousness may be very different from ours does not render its existence any more probable nor the understanding of its qualities any easier.

But it is worth while to analyze this reason more in detail. To point out the utility or the function of a creature, an organ, a sentiment or an institution, is not to adhere to teleology. To say that the nose serves to carry spectacles, or that it is useful, or indispensable or marvelously adapted to such usage, is not at all unreasonable. Furthermore, to attribute to living beings an initiative force whose effects science may observe, to believe that this inner force determines, to a greater or less extent, the development of that being, and to make life and thought participants in universal causality — there is nothing more legitimate than this. But what is absolutely inadmissible is to bind these two ideas together, to attribute to life the power of governing functions, of having purposes and aims and of knowing what is of use to it and seeking it. "A force capable of having an aim," whether the force is higher than nature or diffused through it, is the idea upon which we are prohibited from basing any theory. Otherwise our work would be theological and not scientific.

These principles are common to every science; teleology does not, however, present the same dangers to each.

§ 2. *Final Cause in Biology.* Biology studies living organisms and the working of these organisms. It is not satisfied with giving a description of bodies and of their workings; it tries to understand what is the purpose of a particular organ or tissue. Sometimes the function is as obvious as the organ itself and there is little to do to discover it; on the other hand, sometimes organs present themselves which are of no apparent use. But the biologist is so trained by experience to find a perfect or

nearly perfect adaptation between the organ and its function, that he does not feel fully satisfied until he has assigned a rôle, an aim, almost an "end" to every element of living matter. Everything takes place in the world which he observes "*as if* nature had *willed* to adapt each organ to a particular function."

Teleology is very common in practical biology, and especially so since mechanical causation is very obscure. How has harmony between the structure of living beings and the conditions of existence been established? By selection, by heredity, by adaptation? None of these hypotheses, whatever degree of truth it may contain, gives the mind a complete and satisfactory explanation of our modes of development. Selection explains how beings wrongly organized disappear; heredity, how improvements are handed down through time; adaptation alone views the creation and progress of organs as dependent upon the changes in the environment of the living beings.

No doubt the idea of adaptation may be purely mechanical. It is supposable that beings have been subjected passively to outside influences, that they have become weaker in sterile and stronger in fertile lands; dark under tropical suns and pale in cold climates. But the great transformations in the physical constitution of living beings remain inexplicable by the simple and direct influence of environment. It is necessary for the living being to contribute something of himself, to labor on his own initiative, to bring himself into harmony with the new conditions of existence, to strive to become adapted. Then this adaptation presents to us all the elements of a final cause, a force tending towards a precise aim and employing means suitable to attain it.

Likewise, in spite of the wonderful efforts of the positive and materialistic English mind, the question of teleology in biology presents itself under almost the same aspects as it formerly did. Bacon stated all that can be

said against it, and Aristotle, with whom Schopenhauer is very legitimately allied, all that could be said in its favor. It remains logically inadmissible in positive science; but it preserves a practical and metaphysical value which is beyond question.

In biology, teleology presents little danger, because the mechanical explanation, whenever it can be reached, is always given preference. A superficial mechanism is to be guarded against.

§ 3. *Teleology in Psychology.* The first elements of animal psychology seem formed according to a providential plan. The primitive sensations are precisely the only ones which could guide the living being in his earlier stages, allow him to choose the useful and shun the harmful at a time when his intelligence was too rudimentary to understand the meaning of useful or harmful. Such appears to have been the original rôle of pleasure and pain. Theologians, positivists and materialists agree on this point: life upon the earth could not have developed if the first living beings had not been guided by their very sensations toward the useful.

Pleasure and pain have been useful, indeed, indispensable. They are always so. They have a "raison d'être," an end, which is our existence, and this end is their complete justification. Who will complain of the capacity to suffer when he knows that without pain the animal organism would be quickly destroyed? Who will not excuse pleasure if it is a means of preserving and perfecting life?

Teleology of pleasure and pain is based upon this observation; everything which is of a nature to injure our bodies, or to hinder our organs in the performance of their normal functions causes an unpleasant impression, suffering; an agreeable sensation is, on the contrary, an indication of well being. If our sensations were particularly pleasurable originally, the animal could but abandon

don himself to them without resistance. For the conscious being sensations are instructive, being sufficient to direct but not to decide his course.

But how do pleasure and pain instruct us? Pain indicates some havoc already accomplished. When the sensation is felt, the danger is no longer to be avoided. The shock has already taken place; the body is injured and the animal can no longer save himself from the first injury. He is simply warned that if he persists in the same course, if he does not execute a movement of recoil, he will have to endure further suffering and further deterioration. This warning will more often be true than false, but not necessarily so. It is possible, on the other hand, to find pleasure in persisting in the harmful act and, more often still, harm in continuing in the pleasurable.

There is not therefore a direct purposiveness; pain does not make us shun the harm which corresponds to it, but the harm which might correspond to it. But in what instances and to whose advantage does this indirect purposiveness act? This accord between the useful and the agreeable is especially evident among the lower animals. It is likewise true in regard to the organs or a part of the organs of higher animals. The one which is in pain is threatened in its existence or in its functioning. In the higher animal kingdom, the individual is no longer protected by teleology; pain in one organ may be useful to protect another and more important organ; pleasure presupposes a greater activity of one part of the body, but may destroy the general harmony of the whole being and ruin it to a greater or less extent. Although our senses are often associated, for example, when a pleasant odor stimulates the appetite, as a general thing, we profit by the purposiveness of pleasure and pain only in regard to each of our organs independently.

In the moral world, the utilitarian rôle of agreeable or disagreeable emotions is not the same. They are power-

less to constitute an experience which we should seek or avoid. Grief at losing those who are dear to us does not prevent us from loving others through fear of future grief. Pleasure does not increase nor pain diminish our sentimental being. If we are to believe philosophers and poets, who do not seem to have been poor observers in this matter, quite the contrary is the case. "*L'homme est un apprenti, la douleur est son maître.*" It would be easy to find in ancient and modern literature innumerable counterparts to this verse of De Musset's.

In human life, physical or moral, pleasure and pain no longer indicate what must be sought and what shunned.

Now this purposiveness, for which even a slightly complex animal already seems too large a domain, and which declares itself powerless to aid the individual, may work toward far more distant ends in the development of the race and of civilization. The function of pleasure is to deceive man, to cause him to disregard his own destiny and make him sacrifice his life for the benefit of others. Sexual enjoyment is the clearest example of this; but our moral pleasures which very often serve social ends, are snares which end by absorbing our lives for the benefit of the collectivity. Avarice, vanity and ambition demand great sacrifices in exchange for fleeting joys; the "*bon vivant*," who above all others is certain that he lives for himself alone, in reality sacrifices himself to experimenting in the future luxury and comfort of his fellowmen.

From all of which we draw the conclusion that pleasure, desire, suffering and aversion serve not one purpose, but many. A physical, moral or social end can be assigned to them; but they comport themselves differently in these different domains, they no longer have the same rôle and do not act by the same processes; so that our elementary psychological tendencies do not have an "*end*," but functions, rôles, which chance alone has dis-

tributed and which it alone can take away according to circumstances.

But above all it must be remarked in regard to this question, how manifestly false, contrary to facts, is Herbert Spencer's explanation by the theory of evolution. The agreement between the agreeable and the useful, between the injurious and the painful, cannot have been an important factor in the survival of the fittest because its rôle is less and less important according as we ascend in the scale of being. Humanity is beyond the teleology of the senses; so also are the higher animals and all the more so in that they are higher.

§ 4. *Teleology and Morality.* "So you wish to know if the good and the final purpose are reciprocal?" asked Doctor Pancrace. But honest Sganarelle was concerned with more personal matters and was impatient to discuss his domestic problems with the Aristotelian philosopher. Since Molière, there has been little return to Doctor Pancrace, and yet I doubt very much whether all the attempts of scientific morality or of the science of morality do not always end in foundering upon this same affirmation. "Yes, the good and the final purpose are reciprocal. There is no scientific teleology, no good, no scientific morality, nor consequently, scientific politics."

The most ancient philosophers asked of philosophy what was the aim of human existence; and if, according to Varro, there were two hundred and eighty-eight possible answers to this question, it is easily seen that they were all equally arbitrary. For some, the most ideal, the most disinterested virtue alone was to be desired. They opened to the soul splendid glimpses into supermundane regions, into lands of dreams, far from all reality. Others deceived themselves into thinking they were more positive because they were more earthly. They proposed more material pleasures, enjoyment that was more immediate and more commonly appreciated, but of which man

easily tires and which he has never been satisfied to consider the ultimate goal of his existence.

Christian theology, especially at its beginning, is less teleologic. It transports the final aim beyond the world into the supernatural and can evaluate life in a more positive fashion. Saint Augustine's criticism of pleasure and pain is a recall to reality which preserves its full value. However, in the course of history, the church became teleologic through the influence of Plato and Aristotle.

Biology scarcely dares pronounce the word "end." How much more reserved should the observer of moral phenomena logically be? The one sees organs adapted to functions; animate nature may appear to him as if it tends towards unity and wills a determined end. Is it the same with nature capable of thought? Ought man to seek his end in himself or outside of himself? Subjectively or objectively? Should he, like other beings, submit himself to the laws of nature? Is it his moral duty to put himself in harmony with the general ends of life? But if this is the case, if he is borne along in the general evolution, what is the need of any action of will on his part, what need of a morality? Whatever is, ought to be; whatever is, is moral and desirable without our coöperation. What is the good therefore of concerning ourselves about it?

Does thought have its own peculiar destiny, which is capable of coming into conflict with the purposiveness of living matter? How then is this subjective ideal to be discovered? It is entirely impossible; neither logic nor experience can establish anything further than that what is desired is *desirable*. From a scientific standpoint, the ideal is a psychological phenomenon like any other. It may be studied, and compared but not laid down as a precept. Everyone has his own ideal which is not that of his neighbor; some ideals are vulgar, some noble; some

well-defined, some vague. There are those which are easily attained, others are impossible to realize. It matters little, their genesis can be explained and their value estimated. The ideal can be the object of science, but never its subject. Science cannot make of it an active agent which would have the right to command in its own name.

One of De Musset's heroines is impressed by a picture which represents at the same time a monk praying in his cell and a shepherd singing and dancing in the sunlight. "Which is wrong, which is right?" Science sees with Perdican a man who prays and one who sings; it cannot tell which is wrong and which right.

Must we return to the world-old thesis, that the aim of humanity is to shun pain and seek pleasure? And that among pleasures there are some of a higher order because they are more lasting, since they maintain in a state of equilibrium the body of the individual and the social body of which it forms a part? I believe that those who defend this idea could add little to the splendid sophistries of Plato, the wise theories of Eudoxus, Aristippus and Epicurus, and the ingenious arguments of the Neo-Platonists. And the modern method of practical observation, if one has the courage to follow it to its outcome, would destroy it completely. Nothing proves that altruistic pleasures are greater, or more lasting, than selfish ones, or those of the mind and the heart than the most materialistic enjoyment. The painful reaction entailed depends altogether upon their intensity and not upon their nature. The famous "feeling of duty fulfilled" which could impress a feeling of uniform happiness upon the entire life of every individual, is an artificial creation of the moralists. The spirit of sacrifice, mysticism in monk or laymen, intellectual labor, æsthetic emotion, Platonic or sensual love, and intoxication from alcohol or opium, all of these produce a state of cerebral excitement

which will always be followed by a proportionately unpleasant depression.

Therefore the aim of morality cannot be to discover more intense pleasure, for the amount of this pleasure depends upon our organs, nor to procure for us an agreeable feeling that has no painful reaction, for they all necessarily entail that to the same extent. Must therefore man be advised to avoid all strong emotion whatever its nature, to content himself with insignificant joys so that he may have only insignificant sorrows, and to consider pleasure as a means and not as an end? Pleasure, in fact, informs the individual of what is useful for his preservation. Pleasure being a means towards the maintenance of health, the science of morality might have as its aim to teach us how to make use of this means. The aim of life then would be health; health is the totality of conditions most favorable to the preservation of life. Conclusion: The aim of life is life. Individual or social morality would have no other precept: we live in order to live and in order that the social organism of which we form a part may live. But *ought we* to will to live in order to live? Generally speaking, man does not believe so. Otherwise the maxim: "*Propter vitam, vivendi perdere causas*" would be the expression of the deepest wisdom.

Therefore morality is not a science, because science cannot give it a "*raison d'être*," an end.

We should examine objectively the different systems of morality in order to clarify the history of legal philosophy. For however varied they may be, they seem to us to possess the common characteristic of being irreducible to a positive, scientific, or even to a formal, logical conception. They all contain one and the same contradiction. Every system of morality is the combination of two forces, one of which projects man beyond reality, into the ideal, while the other, on the contrary, recalls him to the material conditions of life.

The so-called positive systems of morality start from data based on actual facts. Thus sociologists, zoölogists, biologists and materialists try to disengage our duty from principles common to every society, to every animal, to every living being and even to every form of matter. They do not attempt, however, to compel us to live absolutely like a stone, an animal or a vegetable cell, a dog or even like a savage or an inferior or an average individual of civilized society. They try to improve everything, animate or inanimate, that is, to take it out of reality and urge it toward an ideal. Systems of mystical morality scarcely do otherwise; they cannot do without a bond with matter. They are cognizant of duties that are common to the higher and lower types of humanity, to animals, and sometimes even to every living being. They claim to lift man from the earth but they are obliged to lead him back again. No system of morality can be entirely of this world or entirely beyond it. They all live in a perpetual coming and going between the matter-of-fact life and mysticism.

Is it necessary to add that however foreign it may be to science, morality none the less fully preserves its grandeur, its dignity and its utility? That it is as legitimate to deduce it from a scientific principle as from an act of religious faith? The said scientific moralities are wrong in only one thing, that is in claiming to be scientific. If they were not sincere in this claim, they would be guilty of unfair competition with the old systems of morality.

§ 5. *Teleology in Politics and in Law.* It was important for us to understand the place of morality in the field of science, for politics finds itself in exactly the same situation.

Societies, especially when they are highly civilized and composed of mixed races, are in a state of perpetual struggle, because opposing conceptions of the ideal strive with one another for supremacy. The rôle of politics is

to choose between them; but has it a scientific criterion by which to do this?

Scientifically, there is no aim to the existence of the individual; still less so to that of societies. Some believe that the destiny of man is to serve God upon earth; for others, the ideal confines itself to an equal distribution among individuals of sufficient food. A moral town with simple and well regulated customs is one ideal; a wealthy, luxurious and artistic city is another. Is a civilization which draws out a tranquil and obscure existence preferable to that which illuminates the world for an instant, fades away, and leaves behind only a memory? Ought we to imitate those who have done the most or those who have done the best? In those dreams which come in themselves to symbolize our ideas, some see immense factories loading upon wagons and later upon boats, piles of petty wares for the benefit of an ever increasing population; while others think of the qualitative progress of humanity, — the existence upon our little planet of a less numerous, but individually a happier race; the creation of less life, but of higher life.

Why one? Why the other? Instinct makes one hesitate and take an intermediate course; this no doubt is the solution to be preferred, because the whole question rests in complete obscurity and no theory deduced by human reasoning can be trusted.

The politician can only hope that science will guide him in the choice of his ideas. She will direct his actions, but holds herself at the disposition of both good and evil causes. The arms she fashions are at the service of the assassin as well as of the honest man trying to defend his life. To be sure, the weapons of political science are not yet very formidable. But it can be foreseen that the social sciences will give the politician means of acting with greater efficiency.

Legal science does not set up for itself its conceptions

of the ideal. It finds them formulated explicitly or implicitly in the texts. Some are tolerated, others admitted, while others still are imposed by the legislator. Our modern legislations are somewhat complex in this respect. They recognize a rather broad freedom in religious belief, — protect, up to a certain point, the æsthetic ideal by preventing the destruction of memorials of the past, — favor, without absolutely imposing it, family life, work or charity, and employ constraint only to repress violations of moral conceptions which seem to them of prime importance. The law does not have the same interest for all of these institutions; it is the business of the jurist to determine the degree of this interest without taking any account of his own personal ideal. If he modifies in any way whatever the philosophical thought which emanates from the text, he no longer fashions law but politics. To take a celebrated example, the French Civil Code recognizes perfectly the right of every citizen to take his own pleasure as his ideal; whoever has a fortune can do with it as he will and spend it to amuse himself. Nevertheless moral considerations make it intervene to hinder the prodigal from squandering it. The proportion to be established between the ideal of the State and that of the individual exists by implication in the text. It is the business of the jurist to extricate it even if he judges it to be harmful or troublesome.

Law is therefore an objective science which can be pursued by precise means. It does not clash with any teleology. One cannot reproach it, as one can morality or politics, with arbitrariness in the choice of its ideal, since it finds this ideal in reality, and besides never appropriates it to itself.

§ 6. *Teleology in History.* From a rational point of view, one might be surprised to see the idea of final cause appear in political history. The multiplicity of events, the complexity of their character, sometimes fortunate,

sometimes unfortunate, periods of great brilliance followed by a decline, wars, invasions, and the periodic destruction of the most splendid civilizations, — all of this does not show forth very clearly a unity of direction for humanity, a function and still less an end to the existence of peoples.

Nevertheless up till very recently, historical teleology was the dominating factor in philosophy. A few select minds elaborated an enormous variety of theories. No doubt historians properly speaking, kept aloof from these controversies and worked according to their positive method. But isolated from philosophy, they remained a long time isolated from other sciences; and when their solitude became too heavy, they often made knowledge too easy and suspicions through theories which were sound only in appearance, and hardly to be commended. History, more than any other science, has suffered from the theory of final causes.

The reason of this is simple. The earliest rôle of history was religious, and that very legitimately. The theologian or the metaphysician has the right, it is even his duty, to ask of historical observation what may be the aim of humanity. Does not history, the observation of human life, play a large part in the religious or philosophical convictions of individuals? We might understand today, as in former times, a history with a theological rôle, such as Bossuet wrote, one which seeks to discover in facts an interpretation of the divine will. It might be theistic, pantheistic or materialistic. Such a history might be of a nature to strengthen individual convictions without ever being able to furnish results scientifically established.

But for it to have even theological importance, it would have to employ a scientific method. Not only would it be obliged to produce facts firmly established without appeal to faith, but it would be necessary to

start from facts in order to ascend to the final cause, and not interpret the facts by the final cause. If, for example, we wish to establish by means of history the fact that this is the best possible world, we must seek to discover whether evil exists only as an exception; and not maintain that a certain evil is necessary to avoid a greater one or to produce some good. Such an assertion may be true, no doubt, but the historical examination can be of no use to it. Now, for a long time historical philosophers have been not only theologians, but theologians who do not write histories, but impose a formula upon the facts without taking the least pains to try and extricate a formula from the facts.

Besides it must be acknowledged that certain philosophers, especially among German thinkers, have frankly declared and maintained that the philosophy of history ought to be constructed by the "a priori" method and quite without the study of facts. Such philosophers are scarcely dangerous; but many others know how to conceal their method quite skilfully, or are even the dupes of a preconceived idea which they believe they discover in reality.

Nobody denies that teleology has been abused in historical philosophy. It is doubtful whether even its use should not be prohibited. The general tendency is to allow greater freedom in this respect to the historian than to the naturalist. Is this legitimate? We do not hesitate to answer in the negative.

If the biologist falls into teleology, it is a special and particular kind. He says that the eye is made *for the purpose* of seeing, the ear *for the purpose* of hearing. He ventures to give a special reason for an adaptation, but for an adaptation which is not to be doubted, since the physical functions are found to be the same in an infinite number of subjects. Can a historical function, the rôle of an event in history, be as clearly shown? What has

been the historical function of a particular war, of the accession to the throne of a particular king, or of a particular revolution in a particular country? No doubt, an attempt has been made to explain in detail each event in history as having a particular aim, — as being the result of a superior will which, for special purposes, assists humanity upon proper occasions. But only very ancient and very naïve historians have proceeded in this manner. The wiser have ignored particular teleogism in order to attain general teleogism, — general enough to embrace the universe. Leibnitzian optimism, Hegelian realization of the idea, the law of progress, the passage from homogeneity to heterogeneity, are the products of this method. While the physiologist starts from the adaptation of the organs and cells to the preservation of life, in order to infer a vital force which tends to become a reality throughout the whole universe, the historian-philosopher is constrained to formulate the principle in its largest conception, in order to make the application of it, first to classes of events, afterwards to particular events.

And it is not through simple love of the “a priori” method or through indolence, that the most practical scholars have written like the greatest mystics. They have been compelled to do so by the force of circumstances. An inductive study of final causes in history can end nowhere. Whoever has no “a priori” idea can find no “raison d’être” for a particular event, or rather, he might find hundreds of them. And if a final cause were found for this historical fact, another historical fact, even the most closely akin, might not have the same significance. One war develops civilization, another retards it, while still another aids or destroys it completely. To take an extremely simple illustration, we should never establish between war and civilization a relation analogous to that which exists between the eye and the sight. If one is to adhere to teleology in history, the most scien-

tific way, in my opinion, is to return to the mythological method, i.e. to apply as a counterpart to human history a divine history which unfolds on parallel lines. The directing will, which itself passes through the most varied situations, thus acquires a suppleness which it does not have in our modern methods. The rivalry between Venus and Juno serves well enough to explain all the varied turns of fortune in the Trojan War; and this symbolism has the great advantage that, being fashioned in accordance with reality, there is no need to torture it with the systematic cruelty of the philosophic historian.

§ 7. *Teleology and Legal Development.* As regards the teleologic tendency, the history of law may either borrow its theories from other sciences or create its own.

Institutions serve some purpose; but either very general or very special ends may be attributed to them. By connecting the moral with the physical world, we may represent the law as the product of natural forces which tend to expand, preserve and perfect life. We may join it to morality itself, and affix to it an ideal to be achieved. Historic teleology will necessarily see, in the changes in the laws, the accomplishment of the task imposed upon humanity. Could we not, therefore, exclude teleology from the history of the law, only by excluding it from the other sciences?

Now, when it thus assumes a very general form, it is particularly anti-scientific and to be condemned. It attracts those who wish to imprison the world in a formula; but the scholar who unfortunately allows himself to be seduced by it, will be guided through all of his career by a prejudice, and will go through life without seeing at all the world of realities.

A very special form of teleology does not present the same dangers, and may be inseparable practically from the positive study of functions. The function of social, moral, juridical or worldly facts is, and has always been,

beyond human foresight and intelligence. The greatest jurist has only very vague ideas concerning the services that the laws which he expounds and explains render to society; the economist, who for centuries has looked upon institutions from the point of view of their utility, knows little more than the jurist in what respect they are of service to man. As for those who at first glance and without special study would like to cut off from the laws whatever appears useless to them, they would commit, in the name of reason, the worst of follies, and in the name of humanity the worst of cruelties and would finish their successive mutilations by annihilating themselves. Thus the first step towards wisdom is the knowledge that we are ignorant of nearly all of the functions of our laws, or of the evil or the good which they may bring us.

The functional study of law is as important as it is delicate. We find ourselves in the same situation as the biologist, but very much behind him; one example will suffice: The idea of punishment in criminal law is one of the most general and elementary. Why should malefactors be punished? Of what use is the repression of the offense? This subject has been discussed for ages. And yet, the most important social utility of that universal institution was long passed over unperceived; to discover it, the profound researches of reflective insight were needed. The function of the penalty is much less to punish the culprit than to maintain the moral conscience by expressing the disapprobation of all towards the offensive act. Durkheim's exposition seems to me conclusive on this point. Yet we remained long ignorant of a truth so evident. Why then should we pretend to understand the functions of more special and less studied juridical relations?

We must not content ourselves with the apparent rôle of institutions, but must search in them for their hidden functions. It is a truth of experience that every juridical

conception has much more "raison d'être" than we may discover "a priori." It is sometimes asserted that a constitutional monarch or the president of the French Republic is of no real use, and could be replaced by a manikin or a signing machine; the opinion is very nearly true, if we confine ourselves to the apparent functions; it is totally false for anyone who looks into the real functions.

In this study of functions, we, like the biologist, coast along the shore of teleology; some caution is necessary to avoid being wrecked upon it. Let us not assert that every rule of law is of necessity useful for something, for we could not explain why that is necessary. Let us indeed point out that between man's needs and man's law there are certain adaptations which are not his own work. But let us not seek for the explanation of probably fortuitous coincidences. Most of all, let us not, by employing the often misleading terms, such as, "instinct," "the directing force of history," "predestination" or "predisposition of human nature," invent some petty providences which are supposed to explain everything but really explain nothing.

§ 8. *Conclusion.* Science cannot deny teleology; but likewise cannot make use of it. Science is the effort that man makes through his reason alone, aided by experience, to attain the truth. It is not certain that it obtains all the truth, or even the most important truths; indeed, going to the extreme limit of scepticism, perhaps science attains only an entirely relative, never an absolute truth. This matters little. But science must, under penalty of failure, admit only those truths which are unassailably authentic and factual; and the only method which enables such truths to be ascertained is the study of efficient causes, i.e., mechanicism.

There are, to be sure, two classes of believers in an exclusive mechanicism. Some see in it an objective method,

capable of explaining everything — of bringing everything back to the same mode of scientific conception, and of looking at all things under all of their aspects. But the more cautious class of believers conceive it only as a subjective method, which confines itself to the particular situation in which our intelligence finds itself in relation to reality. For the former, teleologism is false in itself; for the latter, it is merely inapplicable to science. Then, it might be possible (though the question cannot be settled scientifically) that the scientific method is not suited to investigating all phenomena, nor all the aspects of a single phenomenon.

We do not believe that science can either affirm or deny final causes — either in its beginnings, or in its conclusions, by supposing that the latter have reached the infinite. To bring in final causes as hypotheses seems to us useless and dangerous. They cannot fill in, even provisionally, the gaps in our knowledge, since it is certain “a priori” that they cannot occupy in science any definite place. Inasmuch as we are ignorant of why opium makes us sleep, we prefer to say that we know nothing about it, rather than to invent a “*virtus dormitiva*” for the occasion.

It is said that mechanism establishes but does not explain. I believe this assertion to be very unequally true. Mechanicism is capable of making a full explanation of the origin of a phenomenon; it explains even the existence of functions, the relations between the functions and the organs, and the adaptation. But mechanicism does not explain the “*raison d'être*” of that adaptation, because it cannot be scientifically established that these “*raisons d'être*” exist. No doubt, in sciences, like physiology, where the adaptation of the function to the organ is a constant fact, the philosophic mind will never be entirely satisfied. In the moral and historical sciences, the study of function and of its cause approaches

completeness of explanation, for it cannot be demonstrated that there remains anything further to be explained.

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"Man is an apprentice, pain is his master."

CHAPTER II

HUMAN TELEOLOGY

§ 1. PSYCHOLOGICAL DETERMINISM AND THE LAW.—§ 2. THE WILL AND ACTION IN PSYCHOLOGICAL LIFE.—§ 3. THE HUMAN WILL AS JURIDICAL CAUSE.—§ 4. THE WILL AS JURIDICAL PHENOMENON OR EPIPHENOMENON.—§ 5. HETEROGENEITY OF ENDS.—§ 6. CONCLUSION.

§ 1. *Psychological Determinism and the Law.* Like every abstract conception, that which sees in the human will the basis of our institutions is common to widely different minds. The bitterest opponents who wish to have not a single point of contact are compelled, by the irony of analysis, to become reconciled for a moment.

In fact, that foresight of our fathers which may be regarded as the foundation of our legal past, some choose to consider as ethical and well-meaning; every detail of our old laws is, in their opinion, an ingenious and delicate stroke; they read into each line sentiments of love and devotion to family and native land. There are others who likewise interpret old customs as a human device, but a device abounding in treachery and cunning. What villainous plots have kings, priests, aristocrats, and even simple citizens and ordinary men invented in order to hold the people in subjection! What clever schemes has the entire masculine sex concocted to impose slavery upon woman!

For other reasons, we are prevented from agreeing with those artless thinkers and with many truly learned men who, notwithstanding a deep knowledge of history and institutions, believe that the principal factor found there-

in is the human will. "A priori," this position seems, moreover, very reasonable. In the narrow meaning of the word, man alone has a history, a past where the energies of groups and individuals have been in continual action, —where laws, customs, and manners have been minutely examined, modified, and transformed through the centuries by free and conscious beings.

Free? That is a doubtful point. Is not liberty an illusion of the human brain? If human decisions are included in universal determinism, as is every other physical or biological phenomenon, the action of the will has no importance and is never the real cause of the Law. If, on the other hand, we admit free will, we break the sequence of causes and introduce into history an indeterminate element; therefore we can no longer construct a scientific work.

Many historians of the law have considered it their duty to bring up this question of psychological determinism and free will, only to answer it by falling back upon authority. It is wiser to leave it to the professional philosophers. Nevertheless, in order to understand history, it is useful to gain a clear idea of the fact that the old conceptions of both schools are somewhat antiquated and out of use. It is contrary to the most elementary observation to picture the will as a special faculty of the soul which has as its mission to decide a conflict where the arguments have been developed by the intellect or feelings, and which classifies motives and incentives, choosing among them with entire independence. But the old deterministic metaphor in which man plays the part of a balance, where his thoughts, desires and beliefs are forces foreign to him, externally produced and weighed in some scales or other, cause his decision, is also abandoned. These rough conceptions have given way to more delicate ones, some of which may still use the term free will and others determinism, but all of which presuppose

an active part taken by extraneous causes in human decision, as if by its own essence and accord.

However, it matters little to us. The strictest determinism or most unrestricted free will would in no way change our method. Practically, we shall never have to explain entirely an act of individual nor even of collective will. An absolute tyrant or a parliamentary assembly makes a decision. Have they been driven to it by a popular current or by a group, or by some external force? What part springs from their personal initiative? That is all we wish to know. But was the legislator well or ill, playful, calm or over-excited? All of this may have an influence upon the decision made, and yet we are not going to raise all the questions of hygiene, medicine and physiological chemistry which would be necessary for a complete explanation of the legislative phenomenon. Whether a certain power of the human brain to choose between different motives is admitted or denied, it will stand in our way no longer.

The rôle of the human will in the law is foreign to deterministic philosophy. We shall always have to consider the will as a synthesis of an aggregate of incalculable causes, and do this without expressing an opinion upon its nature.

§ 2. *The Will and Action in Psychological Life.* The will is therefore for us a positive phenomenon whose exterior manifestations we can discern, but whose intimate nature does not concern us. How is it to affect human action, and, more particularly, the creation of the law?

Even mere animals have an aim to their action. They act in order to obtain a certain result. They drink so that they may no longer suffer from thirst, and eat to appease hunger. There exists, even in these rudimentary minds, the foresight of a feared or desired future, more or less immediate, which they try to attain or avoid, and they possess besides a certain knowledge, at least in-

instinctive, of the means to employ to attain this future. The animal obeys the final cause before acting, it imagines a state which does not yet exist and which it will realize through its own efforts; without this anticipated knowledge of what will be, it would not take the trouble to budge. La Fontaine was shocked (and rightly so) at those who maintained the contrary. He attributed to animals traits of remarkable intelligence, which implied cunning, perspicacity in the employment of means, and above all, a very nice conception of an aim to be attained.

In regard to man, can the question even gain a foothold? Can we judge him as Descartes judged beasts, consider his acts as devoid of any intelligence, of any connection with provision for the future and the final cause, subject him to the efficient cause and treat him as a "machine where one movement starts another"? Yes, and No.

Certainly man has desires and aims of action to guide him, and something more distant and exalted,—ideals to which he consecrates his entire life and which he does not even hope to realize in his life-time. Probably coarse in their beginning, they have become by degrees less immediate and selfish, and more lofty.

Now, if every human action is preceded by a desire, and if the intention of gratifying it is the only cause which can make man prefer effort to repose, the history of human aims swallows up the history of humanity; the will is there the only director. What past generations have desired and willed corresponds exactly to what they have done. Especially do the juridical monuments of the past express the desires or ideals of the legislator and of those who have helped in the development of law or custom. The history of the law becomes the history of juridical aims, that is, the history of the philosophy of Law.

Jhering has constructed his subtle work, "*Der Zweck*

im Recht," upon such a basis. No jurist can read, without a feeling of gratitude, that production, which intimately connects the law with general philosophy; but the fact cannot be disguised that a large part of his argumentation rests upon a false application of formal logic and not upon a truly objective method. In fact, he proves very clearly that it is always possible to attribute logically a reasoned aim to every act, even the most unreasonable. Observed from without, every one of our movements can be explained as having a premeditated end. He concludes from this that the true motive force of our actions is necessarily the desire for realization. A conclusion doubly rash! Psychological observation of internal phenomena alone might furnish all the needed information if, in fact, man always knew what he desired before he acted. In case this were so, it would still remain to be proved that this purposive representation is the cause of our decision.

Observation certainly seems to prove the contrary. Our most reasonable acts often have no aim which has been reasoned out. The things which we do through habit or in imitation of somebody or something, and which are so numerous in our daily life that they may almost completely absorb an individual's existence, are not preceded by any representation of a future to be realized, or by the search for any enjoyment. Those who saunter and lounge around "to kill time," frankly acknowledge that they have no aim to their actions, for "killing time" cannot be a reasonable desire.

The man who is active and conscientious does not become so by the grandeur of the projects which he conceives, but he seeks a vocation and an aim in harmony with his character. He proposes to do right before knowing what he will do to do right. It has been said that it is easier to do one's duty than to know where the duty lies. This may be better expressed by saying that our

will often operates in empty space, without a concrete representation of a future to be realized. It is no longer formal logic, but the observation of life which exhibits man as poor in desires and plans. He acts, urged on by multiple internal or external forces. He embellishes his actions with teleologic representations, with dreams of the future; but how artificial these aims sometimes are, how foreign to his true nature! Thus man is inclined to give his life a very general aim; in this way he may justify, by a single reason, acts which are most contradictory and have the most different psychological causes.

Thus certain Utopias, though as little attractive as reasonable, succeed none the less when they are adapted for the subjective development of widely different temperaments, giving some a pretext for needed devotion and sacrifice, and to others, for violence, the spirit of despotism and wickedness.

Clearly, there is no need to exaggerate. The human aim (material or ideal desire) is a force which may accidentally be the only real cause of an action. But it is certain that this is not always and necessarily so. Here arises the extreme difficulty of fixing the rôle of ideas in the course of history. Fondness for institutions or the pursuit of reforms may appear as independent and efficient causes in the formation and preservation of the law; on the other hand, present or desired institutions are simply the bodies of activity and their rôle is to provide aims to human life,—to give man the illusion that he does not spend his energies in vain and that his work is of some use.

§ 3. *The Human Will as Juridical Cause.* We have fixed the rôle of the idea of purpose,—of the aim desired by the human brain. It is only accidentally the cause of the act of will properly so called.

But what influence has the act of will in itself (abstracted from the decisive cause) upon juridical crea-

tions? Is the law produced by an effort, by a struggle of man against himself or others, and is its progress the reward of this struggle? Savigny prefers to consider the law as developing from tendencies natural to man, harmonizing itself with the environment which produces it as easily as the tree flowers. Will, conscious effort and struggle, is, on the contrary, for Jhering the generating fact, which has extracted, from a very meagre psychology, varied institutions capable, in their turn, of enriching the human brain. Both of these conceptions are possible; they are even simultaneously so.

What appears more doubtful is that every juridical conception, at every epoch, has required the same degree of tension of the human will. There are some branches of law which have flowered of themselves; the only trouble the legislator has had is to gather the blossoms. There is, on the contrary, some progress which has long been wished and passionately sought and whose realization has been possible thanks only to violent efforts on the part of legislators and private individuals. Savigny and Jhering are rather the two poles of the same psychological truth.

It appears to me probable that it is only a question of epoch. Never was the formation of the law entirely unconscious, never was it entirely voluntary. I believe that there may exist, besides, phenomena of juridical creation which are *concomitant* with no act of will. Discussions of doctrines are of this nature. But more often legislator, judge, and litigants, in bringing about the birth or the extension of law, will something which they have in mind very definitely. But what do they will? Why do they will it? And does their act of will accord with the future of the Law?

§ 4. *The Will as Juridical Phenomenon or Epiphenomenon.* It happens continually in life that we deceive ourselves as to the real cause of our actions. We attribute

too large a part to our personal initiative, when, in reality, we are doing nothing but unconsciously obeying others. No doubt our actions are preceded by an act of will. In the domain of psychology also "*coacta voluntas est voluntas.*" But if, being given our situation, we could scarcely will anything but what we do will, this phenomenon, so important for our conscience, may be neglected in reality. Causes may be linked together without taking any account of our act of determination which we believe decisive but which simply constitutes an epiphenomenon.

In the creation of the law, the power of the will may also be modest. The legislator and judge believe that they decide; in fact, they are, perhaps, impelled by outside forces of a moral or physical nature. No doubt they say "we will"; and they do "will" effectively; but they will, perhaps, what is decided elsewhere, what they could not prevent. The juridical will which attends the birth of the law, would then be a simple epiphenomenon incapable of explaining anything. It is doubtless by a reflection of this kind that Jhering, after having exaggerated the rôle of the human will, neglects it entirely in his last works.

In order to have the right to conceive of juridical evolution aside from every voluntary act, two things would have to be proved: first, that every act of the human will is not only determined, but that we have the means of explaining it entirely by a certain number of causes; second, that man always obeys external forces, or certain moral impulses, and that we can calculate what is necessary in each case to clinch his decision. Then we might neglect the human will.

But it is certain that we do not know exactly what passes in a human brain at the moment when it takes part with or against any specified institution. Even if we knew all of a person's sentiments, we should not then understand why some have triumphed over others. The

expression "will" condenses these multiple enigmas. Moreover, while admitting that the will is based upon the total number of determinating causes, it lives by their effects. To decide is to annul certain forces to the advantage of certain others; it is not to give the resultant of all the forces in sight. That is still truer juridically than psychologically. Generally, the legislator (and especially the judge) has only the choice between two solutions, and, between tendencies which are directly opposed, a compromise is impossible. The act of the juridical will is, therefore, in general casuality, a new phenomenon of the highest importance.

The will interrupts universal causation, not positively, but negatively. It has not created what it chooses, but it destroys what it does not choose. In physics, contrary laws combine; when the wind carries away a feather, it in no wise diminishes the power of the earth's attraction. In the moral world, when the conqueror places his foot upon the vanquished, of the two rivals whose force was nearly equal, one remains all powerful, the other is crushed forever.

§ 5. *Heterogeneity of Ends.* We are still far from teleology. We admit that man intervenes in the creation of the law and that his will has considerable influence. But whether that influence is all powerful, whether it is in accordance with his foresight and desires, is another question. In order to direct consciously his own destiny, man would have to understand the functions of the law before realizing them, and to realize them as he conceives them. If there is not this agreement between his foresight and the results, there is not an end, it is no teleology. If the goal is not decided upon before the departure, there is no longer a goal, but a limit, a point of arrival. The subtle work of Jhering, "*Der Zweck im Recht*," exhibits the tremendous fault of continually confusing the end and the function. There is a final cause when we realize our

desires of former times, and not when we are their dupe, and when we should not be doing what we are doing if we look into the future.

No doubt, the legislator makes laws because he believes them useful. Will they really have the use he attributes to them, and will they not have others? The experience of history shows that if we try to reason from present functions to past intentions, we are almost certainly mistaken, and as far as the laws which we see made are concerned, it is easily shown that they seldom bring about the results which were expected from them when they were being drawn up.

A scientific form has been given to this phenomenon by calling it the "heterogeneity of ends." An institution but seldom performs its first function, that for which it was created. It serves, on the contrary, many other purposes which were not suspected in the beginning and are sometimes never suspected. So true is this that a proof of child-like simplicity is shown by those legislators who believe in the omnipotence of their will, by those interpreters of the law who think that they can attain insight into the use of laws by examining into the labors connected with their preparation, and finally, by those very numerous critics who reason upon juridical functions as if they were obvious.

Where can this disagreement between the end willed and the real function spring from? Is it equally unavoidable in every epoch of civilization and in every juridical field?

The declaration of will no more produces an immediate effect in the law than it does in the physical world. In order to change the present, a certain opposition, a resistance, must be overcome. Direct and violent action towards the desired aim will not always have the best result. In the first place, we must understand the nature and strength of the resistance to be overcome, in order to

know how it can be overcome. Thus the legislator often fails in his purpose through ignorance of the proper means to employ to gain it. Without a certain amount of knowledge and resourcefulness, one cannot hope to realize the juridical aim. But there is here an accidental danger which may reasonably be avoided when knowledge arrives at a certain stage.

There are other causes of disillusion for the optimistic legislator. It is very seldom that the effects of laws are simple. Generally, they are exceedingly complex. When the legislator succeeds in producing the desired result, he produces at the same time a great number of other consequences which were never willed and which, in reality, may be more important than the result sought. Thus the strictness with which the French Civil Code has enforced equal division of property has indeed somewhat equalized fortunes as was desired; but its effects upon the parcelling of lands, and upon the movement of the population, were not willed, and are, perhaps, more considerable.

This second danger can be avoided only by experience, — a very long experience, to be sure. It is not, however, unreasonable to hope that, after centuries of groping, the legislator will know how to obtain a willed result and to avoid effects not willed.

But whatever may be the knowledge and experience of the legislator, supposing it to be complete, he will always fall short of his mark. No doubt, one may manage to calculate the future for a reasonable length of time; man might realize his will in the law if he could take into account all the circumstances of the present. But the perpetual flux and flow of things does not permit him to foresee how the institution which he has created, will bear itself in the juridical environment of tomorrow. For instance, the law which yesterday favored commerce may be a hindrance to it today; that which tended to strengthen

the family may become prejudicial to it if customs have changed. In political institutions, we see organs of moderation become those of revolution, and vice versa. For each century and each task, the function changes entirely of itself, without the intervention of a directing will.

More quickly — very much more quickly — than the function of the law, the directing will — the political ideal — is changed, so that supposing the laws table, there could be only a momentary agreement between the human will and the function of the law. "We never go down into the same river twice," the Greeks used to say. We never have the same idea twice; we do not will the same thing twice. The descendants can hardly completely reestablish the ideals of their ancestors. The original purpose of the law is unknown.

Is this equivalent to saying that the heterogeneity of ends is a (natural) law, an inevitable result which has always been and will always be produced with the same intensity? It is certain at the outset that this is not a law, but the establishment of the negative phenomenon that the human will is not omnipotent in the creation of the law. This phenomenon is, moreover, not general; it is not always produced to the same degree in every epoch and in all branches of the law. Those who affirm most vigorously that prevision of its functions has never been the cause of an institution, do not any the less propose reforms which would be inconceivable if man were in a position not to foresee functions to any degree.

Likewise, in regard to the method of the history of law, we draw, from this phenomenon of the heterogeneity of ends, some conclusions which are diametrically opposed to those which prevail at the present time. It has been said that the law ought to be studied by epochs, for the functions of institutions vary according to the epoch. And it is precisely because these functions do vary that

we prefer the vertical method (by means of an institution) which throws these variations into relief. For the heterogeneity of ends is not a principle which we establish once for all and then no longer take into account. It is, on the contrary, one of the chief objects of our research. Knowing as yet very little in regard to its true nature and importance, we try to follow functions in their variations. Every time that the human will has tried to seize the management of the law, it is important for us to know to what extent it has succeeded, and to study how the law has slipped away, to a greater or less extent, from its grasp.

§ 6. *Conclusion.* The human will is a juridical cause, but it is nothing more than a cause. It urges the law to the right or left, it knows not whither. Must we compare it to Luther's tipsy peasant, who cannot stay on his donkey, but falls sometimes to one side, sometimes to the other? This would, perhaps, be giving it too much honor, for the peasant knows that he has a road and wishes to follow it, although he cannot. The juridical will has no road to follow. It goes, as a poet says, "*Où va toute chose, où va la feuille de rose et la feuille de laurier.*"¹

But the nature of the human will cannot be despised; it is more potent so far as its force is concerned. It is conscious of its strength, but unconscious of its aim and the result of its efforts. If the hopes of the legislator and the results which he obtains be compared, sorrowful reflections might be made upon the subject. But the legislator is not bound to go and sign the death certificates of the patients whose cure he promised, — and that costs some illusion in his reckoning.

The history of the law is obliged to confess this century-old powerlessness of the most profound thinkers and

¹ "Where goes everything, where goes the leaf of the laurel and the leaf of the rose."

the most energetic wills. The law is not the human will realized.

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BOOK II

CAUSALITY IN THE HISTORY OF LAW

CHAPTER I

THE IDEA OF CAUSE

§ 1. INTRODUCTION.—§ 2. THE OBJECTIVE AND THE SUBJECTIVE CAUSE.—§ 3. THE PROBLEMS OF OBJECTIVE CAUSE: (1) DEGREE OF IDENTITY BETWEEN CAUSE AND EFFECT; (2) DIFFICULTY OF FORMING CAUSAL SERIES; (3) INDIVIDUAL CHARACTER OF THE OBJECTIVE CAUSE.—§ 4. THE SUBJECTIVE CAUSE: (1) UTILIZATION BY MAN OF CAUSAL PRINCIPLE; (2) MAN'S TREATMENT OF CAUSES.—§ 5. CAUSALITY AND CLASSIFICATION: (1) COMMON MISTAKES IN THE APPLICATION OF CLASSIFICATION TO CAUSAL INTERPRETATION; (2) METHOD ADVISABLE FOR THE HISTORIAN.—§ 6. CAUSALITY AND CHRONOLOGY.—§ 7. HISTORY AND CAUSALITY: (1) INDIVIDUALIZATION AND GENERALIZATION OF CAUSES; (2) OBJECTIVE AND SUBJECTIVE CHARACTER OF TWO OPERATIONS.—§ 8. THE CAUSE AND THE ORIGIN IN THE HISTORY OF INSTITUTIONS: (1) INVESTIGATION OF INDIVIDUAL CAUSES OF JURIDICAL FACTS, OBJECT OF LEGAL HISTORIAN; (2) NECESSITY OF DISTINCTION THROUGH ANALYSIS BETWEEN THE OBJECTIVE AND THE SUBJECTIVE CAUSE.

§ 1. *Introduction.* To those who, like ourselves, maintain that the object of the history of law is to study the causes and effects of institutions and laws, a very embarrassing question may be propounded, i.e., What do the words "cause" and "effect" signify? Can we define them, state accurately their nature and their rôle, and utilize them in practice as well as in theory? If our ideas in this matter are confused or open to discussion, will there not be a fine opportunity for our opponents to attack us and to claim that our work is vitiated in its principles? In every-day life, it is often excusable to proceed at random; but science lives in precise ideas, in clear conceptions. Can we work by means of principles which we do not entirely understand?

Cause is, however, still an obscure idea. Very far from being simple and accessible to all brains from birth, it is a principle of experience that may be looked upon from multitudinous points of view, one of which would in itself be sufficient to form a science whose goal generations of workers would not reach. If it had been necessary to wait until a complete and incontestable doctrine of causality was elaborated before making use of cause as an instrument of research, the greater part of the sciences would still be in a very rudimentary state. Experience has shown thousands of times that we know, by instinct, how to handle this instrument whose mechanism is not entirely known to us. It is, on the other hand, a tool which may be refined by usage. The study of cause in the history of law is valuable for history and for law. But it may also make causation itself appear under a new light.

§ 2. *The Objective and the Subjective Cause.* All matter, all movement of matter, all sensation and thought are products. Other things, physical or moral forces, have preceded them and caused them to be produced. Every thing that exists draws from a past, near or distant, the reasons of its existence. Nothing comes from nothing; no being without ancestry. Such is the principle of causality in its essence. It is objective in its nature. Even were there no intelligence to understand it, its rôle in the creation of all things would not be diminished thereby.

But at a certain stage in its evolution, the human brain came in contact with this natural verity, understood it, in so far as it was able to understand it, and made from it the idea of cause. Man such as he is can no longer do without such a conception to direct him in his scientific and practical life. But neither can he grasp the real cause in its entirety. He is obliged to neglect certain truths in order to concentrate his attention and his memory

upon certain others, and he has — perhaps by pure chance — the power of neglecting a large part of the true, without compromising thereby the accuracy of his partial observations. He cannot see the whole; he understands at best its details. He cannot consider the absolute, but that very imperfection permits him to study all the better the relative, which is, perhaps, a more subtle element of the truth, and is, in every instance, undoubtedly far more useful.

Thus science employs subjective causality in the sense that it takes a full account of its defects. It realizes that it is made according to the measure of human intelligence and cannot therefore agree perfectly with reality. Pure speculation can furnish us with ideas incontestably more objective, but far inferior as instruments of labor.

There exists then an objective causality and a subjective causality; objective problems of causality,—efforts to understand better the real movements of material and living things, without caring to increase the sum of our concrete knowledge; and problems of subjective causality, ingenious combinations to make the best of materials that our intelligence cannot employ in their totality.

Every science has its own methods of investigating causality; chemistry, physics, medicine, and mechanics each has a special conception of cause and not one is absolutely objective. We must not, except very cautiously, pass from one to another, with the same logic.

In the moral and psychological sciences, the idea of cause becomes so subjective and specialized that reality seems to have been abandoned for a world of fantastic abstraction.

The Schoolmen were always ready to argue upon the following subject: When one succeeded in gaining the goodwill, the affection, or the love of another by bestowing gifts upon him, what is the true cause of the senti-

ment? Without the gifts, the sentiments would never have arisen, and yet they cannot be the cause of them, for self-interest cannot be the basis of a truly sincere bond of sympathy. Today one would be tempted to see in such a discussion a series of plays upon words. This would be a mistake. It is a question of a problem in psychological causality, the positive solution of which would not be without interest.

Juridical science has enough causal ideas which belong to it. The cause of a damage is more objective and that of a contract more specialized. Even when texts enumerate the causes of divorce, of infamy, of disinheritance, etc. — the connection with metaphysical causality is not completely broken. The law eventually gives to certain facts a causal power over concrete reality.

§ 3. *Problems of the Objective Cause.* These questions appear at first sight, inopportune. Pure philosophy, metaphysics, which ordinarily is not averse to walking in the clouds, has not believed that too much effort ought to be devoted to understanding more thoroughly than is useful to ordinary logic, the nature of cause. The empirical idea, in its simplest form, sufficed a long time for the progress of the physical and the natural sciences. Scholars could ask no aid on this point from the philosophers, and the latter allowed themselves to be fascinated by a single question, the least important, and one which, in any case, they were in no position to answer, for it is purely historical: how did the idea of cause become introduced into the human brain?

1: DEGREE OF IDENTITY BETWEEN CAUSE AND EFFECT. From the Middle Ages down to quite recent times, problems of objective causality have been seldom proposed, at all events, seldom thoroughly investigated. The one to which classic philosophy most often alludes is the degree of identity between the cause-phenomenon and the effect-phenomenon. In reality, every new fact

results from a combination of several old facts; it is certain that each has its part in causality although for us some of them may be negligible. The qualities and the proportion of these different antecedents and the process of combination which unites them should contain the effect and become identical with it. The Schoolmen used to set forth this idea by distinguishing three kinds of cause: "formalis, materialis, et efficiens." Thus the cause of a statue is threefold; a material is necessary, e.g., marble or bronze; a certain capacity, some talent and the intention to work on the part of the sculptor; and finally, effective labor, which incorporates in the material the thought of the artist. This analysis of the causal antecedent was presented more or less successfully and more or less profitably by the thinkers of the Middle Ages. It has subsisted in traditional logic as a didactic and uninteresting division. Bacon began to abandon it: he particularly recommended to the sciences the "causa efficiens." However, the "causa formalis" did not seem to him valueless. It absorbed much of his study, perhaps too much. But he removed it from causality, and carried it into the realm of metaphysics. The formal cause becomes the form, afterwards the substance, and ends by eluding us altogether.

The three-fold division of the cause does not appear to me devoid of interest. Applied to juridical life, it would give as material, the law. Parties have to take therefrom the materials of future acts. The psychological state of the persons wishing to make the contract would be the second element of the cause. Finally, the action of one upon the other when it issues directly from the parties or from an intermediary, corresponds to the efficient cause. Evidently, this is a rather naïve approximation to reality. It cannot be denied that it is a purely objective effort. It seeks to discover in the past reality, the present reality in as complete a form as possible

The method of the Schoolmen is to try and catch reality in a snare which has been woven by logic. But the mesh is never close enough and truth can escape. His conception of causality is evidently rather coarse. It is perhaps impossible to group in three classes the elements of a real cause; even if this could be done, these formulas would contain ideas of so varied a nature that they would tend rather to conceal reality than to make it understood. Not three, but a hundred, a thousand causal categories might be distinguished without exhausting reality. The number of small causes which are grouped together to form even small facts is infinite. However, we must not for this reason recognize any the less the merits of the thinkers of the Middle Ages. They saw one thing rather difficult to see: i.e., the effect contains all the elements of the cause-phenomenon and the cause is completely known by all the elements of the effect-phenomenon. All the molecules and all the forces of the one should be found identical in the other, and they are all necessary. Then the cause is identical with the effect. They understood that this truth is objective. The human mind — even the most scientific — sees a world of metamorphoses, with causes and effects following but not resembling one another. Even when we perceive the “*raisons d'être*,” we do not see the resemblances. We understand very well how an explosion destroys a house; but that the catastrophe does not change in any way the former state of things, our reason refuses to comprehend. But it is true, nevertheless, from a certain point of view.

On the other hand, when modern philosophy tells us that the *relation of causality* tends to become a *relation of identity*, it reaches that conclusion by analyzing our psychological states and it allows the existence of a certain confusion. If we are more and more inclined to admit that identity and causality blend, it is through reflection and through observation of reality and not through any

intellectual need. As far as our intelligence is concerned, the two terms could be separated indefinitely. No science has it as its aim to follow up this identification.

2: DIFFICULTY OF FORMING CAUSAL SERIES. When we speak of cause and effect, we seem to be looking upon phenomena as constituting families in which the son recognizes his father and mother and knows who is related to him and who is not.

Now it is very certain that the number of phenomena which have contributed even directly to the production of any single thing is greater than we can imagine. We are unable to reëstablish cause in its entirety and we are aware of this limitation. But we may go farther and believe that the entire universe is conjoined, that everything is in everything; that there is no filiation of phenomena, but innumerable attractive or repulsive influences, coming from every direction, and that it is the resultant of these that we observe.

If I place my pen-holder upon the table, that act scarcely seems to me to have any consequence. It has, nevertheless; it occasions a shock, a vibration of the air. Is it possible to fix the limits of such insignificant effects? Must they be confined to the table, the room, the town, the country, the terrestrial globe? Is not the whole universe affected by them to an extent unimaginably minute, but very real nevertheless? Does not that movement of which I perceive only the physical effect, the disturbance of the air, exercise an influence, infinitesimal of course, upon living beings, upon the actions and thoughts of individuals at infinite distances? By a confusion of the objective and subjective cause we say that it is legitimate to neglect the inappreciable. Yes, in practice, but not in theory. If the infinitesimally small things of the universe have a determinable zone of influence and are not conjoined, it is probable that this is proportionately the same with great things. It will

therefore be allowable to establish classes of facts or of things which by nature or distance have no relation with others,—form independent series. If, on the other hand, an infinitesimal and inappreciable solidarity binds together the infinitesimally small things of the universe, it is necessary, *a fortiori*, to presuppose the existence of an appreciable solidarity between phenomena of a higher order, and we shall conclude from this that a classification of causes is a subjective necessity, but corresponds to nothing real.

It does not seem to me that there is any way whatsoever of solving the problem. We must therefore be extremely cautious in creating causal series, when they are practically necessary.

3: INDIVIDUAL CHARACTER OF THE OBJECTIVE CAUSE. Objective causality is essentially individual in all of its elements. It has recently been maintained that the individual has no cause. It may be asserted, on the contrary, that the individual alone has a cause in so far as it is individual. There is and there can only be in the universe an infinite number of particular phenomena, but no general phenomenon. If we have the advantage of being able to unite in a single conception an innumerable number of analogous beings, we must not forget that by that very process we renounce a more intimate knowledge of these beings. As far as I am concerned, the waters of the Atlantic, of the Pacific, or of the Mediterranean are all the same. Provided they are capable of carrying steamships and of allowing fish to live in them, I am not anxious to penetrate further into their intimate composition. But in reality, each molecule, each atom, each living cell has its characteristics, its destiny and its history. And each of these small destinies plays its part in causality. However small the particles into which we decompose matter, however much alike may be their elements, each of them has none the less its own indi-

viduality. If we were able to mark with a blue or red cross, as we do sheep, a certain atom of oxygen and thus follow it in all the combinations into which natural or artificial forces might incorporate it, upon finding, one day, our molecule joined with hydrogen to form water, the real cause of *this* water ought to indicate why *our* molecule was found there and not some other.

There is nothing fungible in the universe. Everything is individual, everything individualizes itself and tends to become individualized. We cannot distinguish the individuality of certain things which present identically the same interest and seem absolutely alike. In a flock of sheep of the same breed, and the same weight, each unit appears devoid of any differentiating characteristics. And yet, the shepherd recognizes them all without hesitation, even if there were hundreds of them, and can detail at length the peculiarities of each.

If while I was walking along the street, a certain person should fall upon my head, I should include in the cause all the circumstances which made *that* person fall, at the moment when I was passing under the window. If, on the other hand, a bucketful of water fell on my head, I should try to establish the cause by the reasons which made me pass at the moment when the water was being thrown out. But the individuality of the water which was thrown out is as real an element as my own individuality and if it is not taken into account, the true causal relation will not be objectively established.

§ 4. *The Subjective Cause.* It is evident that all of our conceptions and all of our perceptions are subjective. They must have crossed our brains for us to become aware of them. There are some among them which experience and reflection have verified as conforming to reality. There are others which we know perfectly cannot correspond exactly to anything real but which, nevertheless, give us the best means of understanding and of acting on

the totality of things. Thus it is with the principle of causality.

How does it happen that our brain has found means, theoretically very imperfect, but practically very powerful, of adapting ideas to things? This enigma is not yet explained. But the fact is certain that it has been very useful to humanity to look at Nature through a certain prism which transforms objects without destroying their proportions, in such a way that by combining fictions it judges with as much accuracy as if the thing itself were in its hands.

1: UTILIZATION BY MAN OF CAUSAL PRINCIPLE. Man may utilize the abstract principles which are deduced from things, as well as the things themselves, for his personal service. Just as a horse can be hitched to a carriage, or water power accumulated for industrial uses, so it is equally possible to employ the causal principle to penetrate the nature of things and perceive their secret qualities. If we know how a drink is made, what liquids have been mixed to form it, we imagine its taste before we put it to our lips. If we know the causes of a sorrow, we understand the attitude and the tears of the person who has been afflicted by it, and even the pain which is concealed from us. Accordingly, the cause may be explicative; it may, however, quite as well not be so. It does not exist for the purpose of explaining further whether or not the horse was created for our use. Our brain has the power of making it serve sometimes in that particular use; but this power is variable. Sometimes, by no other means than that of cause and effect, we are able to dissect extremely complex things and to recognize, as familiar to us, the minute elements which are thus revealed. On the other hand, it very often happens in the moral as well as in the physical sciences that our ability to explain phenomena by the cause, is absolutely null.

The human mind is not satisfied to utilize the causal principle in itself by observing the action of phenomena upon one another, and discovering in the product the qualities of the producer. Logicians of the most widely differing periods and schools have combined it with their other processes of reasoning and have inserted it in general logic.

Thus by a sort of symmetrical analogy, it has been concluded that the same causes produce the same effects, according to the inverse and very contestable principle that the same effects are produced by the same cause, with which may be practically compared the "*cessante causa cessat effectus*." Now, practically, the same result may be obtained by very different processes. No doubt, theoretically, the process will not be the whole cause, nor the result the whole effect. But if we deal with absolute reality, the principle has no longer any meaning, for there are no two effects which could be *the same*. This is not saying that logicians have been entirely wrong upon this point and that their corollary is wholly false. The same effects might spring from the same causes in an imaginary world where integral causes and integral effects could be *the same*. Accordingly, the more we shall group together the elements of the cause-phenomenon and of the effect-phenomenon and the more we shall study them objectively, the more our adage will approach the truth. We shall thus be provided with a criterion which is not to be disdained.

The principle of causality has very unfortunately served to justify inductive reasoning and to bestow upon it its entire authority. Each of the two, none the less, has, and has always had, its independent existence, and its special rôle. In the search for truth the causal process may also be combined with induction and deduction. Hume gives us an example of this: If we discover a human foot-print in the sand of the seashore, by ascending from

the effect to the cause, we can assert that a man has passed that way. But as we know by induction that men have two feet, it will appear legitimate for us to descend from the cause which we have not seen, to another effect which we no longer see, the second foot-print, which the wind has, no doubt, effaced. Such a logical operation is not absolutely certain; it is worth only what induction is worth and could be admitted only into sciences which have very strict methods of verification.

2: MAN'S TREATMENT OF CAUSES. Man has had the happy privilege of believing that he knows everything when he knows almost nothing, and of using tools that are essentially imperfect without being aware of their imperfection. It is likely that he would have lacked and would still lack courage to work, if he had known and if he knew the true value of his labor. This has been so in the world of abstract principles as well as in material life. Of the real cause, he chooses what suits him, or what interests him; he gives to that portion of the cause a value which it does not possess in reality, and calls it "efficient cause"; he announces that this element of the phenomena is of chief importance, while other elements are either completely neglected or placed in a lower rank under the term "occasion." Now it has been found that this arbitrary fashion of treating things has been more useful than harmful. It is quite evident that we could never have thus explained the whole of a concrete phenomenon, but what is of more value, we have thus been able to disengage certain physical and moral forces, to study them in their action at close range, to recognize them in various phenomena, and to see how they deport themselves elsewhere. This is why, even though we are conscious of the fact that our idea of cause is essentially subjective, there can be no question of abandoning it. The best we can hope to do is to obtain a more precise knowledge of the value of methods which have been proved practically, but whose

position theoretically might need to be established more firmly.

The human intellect neglects some more or less important elements of cause, through necessity, ignorance or intention. Through necessity, for it cannot know everything nor, especially, know everything at the same time; it fixes its attention on what is the easiest to perceive, and of the greatest use. But the neglected causes are not treated disdainfully except by the truly ignorant,—by those who are ignorant of their own capabilities and of the restricted horizon of their thought. This, however, is not a reproach to cast upon a person; this ignorance has its advantages. It would be very dangerous, no doubt, if exaggerated tendencies did not correct one another. Thus those who fashion historical laws would lead us astray, if they were not so numerous and so opposed to each other. Each has taken but one element of general causality and tries to see in it the sole decisive and continual force. Each affirms that the whole of our history is a development of our physical nature or of some moral force, like interest, the tendency to imitation, the search for the ideal, or the unfolding of the collective thought. Through the course of history, he has gleaned some fragments of causes and, from this débris, he tries to construct not a complete objective cause, which might well be the goal of his ambition, but a law, a cause of permanent causes, which produces perpetually and unceasingly, the entire world of institutions. If there had been but one single historical law, it would have killed science; but there are multitudes of them which act as antidotes to one another. Logic loses but scientific activity gains from this state of things; and schools based upon a paradox adduce some substantial and interesting results which would not have been produced without the necessity of upholding the paradox. It seems to me, however, more scientific to attach as much importance to

appraising the rôle of unknown or neglected causes as of known causes.

The choice of certain elements of the cause and the elimination of others can be effected through scientific calculation. The various methods of experimentation are nothing else. The methods of agreement, of difference and of concomitant variations, analyze complex phenomena in order to subject a single one of their elements to a prolonged observation. Cause is then particularly subjective. One becomes engrossed with a small portion of reality; but the phenomenon in its entirety is for the experimenter, a crude substance from which he tries to extract the essence and reject the dross.

But even by studying the origin of concrete facts, we judge the cause in an artificial, sometimes even in a somewhat arbitrary fashion. Thus in a causal combination, any element whose function can be easily supplied without the definite result being, for us, sensibly changed, does not appear to play the part of a true cause. If a soldier falls in the midst of a storm of bullets, the one which struck him seems scarcely to have caused his death more than the others. Any one who would lay a purse of gold in the middle of a much traveled road would, in our opinion, invite theft by his extraordinary conduct; the dishonest person who would take it would do only what many another dishonest person might have done in his stead, and accordingly he would not seem to us the direct cause of the theft. The juridical theory of provocation has been introduced under the mask of causality; but a causality that is essentially subjective.

It is likewise for practical reasons that causes which are repeated most often seem to be of greater interest and importance. Phenomena which are reproduced most frequently are particularly worthy of our attention because by a single observation and a single interpretation, we discover a larger portion of truth. Evidently the aim of

science is to combine the greatest amount of information possible. Accordingly there is a certain advantage in commencing with the ordinary, with the general, rather than with the extraordinary, the exceptional. What many scholars have through mistake believed to be a question of fundamentals, is only a question of method. But we shall see elsewhere what part the exceptional, the individual, even the accidental, may play in science.

§ 5. *Causality and Classification. Diversity of Nature between Cause and Effect. Cause and Reciprocal Action.* Classification is interesting from an intellectual point of view. It offers multitudinous advantages to our minds, particularly that of being able to take in at a single glance a number of important things. (a) It may be entirely arbitrary, made only for us, without taking into account the intimate nature of the things thus arranged. We may group people according to their size or their color and separate what lives in the water from what lives upon land. Such classifications are not false, in themselves; they should serve only that particular need for which they were instituted: (b) There are others that are more scientific, such as those into mammals and fish, which reveal a great number of common characteristics. All scholars try to establish such classifications in their special fields. Finally (c), there are those which reveal a bond of relationship between things, such as those upon which the genealogy of living beings is based. There is thus obtained a maximum of objectivity in classification, for our logical operation corresponds then to something which is actually accomplished. It is important not to confuse these three operations which in the main have only a name in common.

In the search for causes, we may utilize classifications but not unless we have made a preliminary study of their characters. If classifications are poorly made, they are purely artificial, and I strongly suspect psychology of

furnishing this kind; if they are well made, they belong in the second category; they are natural and based upon a great many common characteristics. These are the most ordinary kind. They are almost never genetic.

Thus, in the study of cause, we shall group together the biological, the psychological, and the juridical causes; we shall be able to study the various subdivisions of each of these categories in so far as they can produce institutions. It is evident that the phenomena which have common characteristics and belong therefore in the same class, will conduct themselves in relation to the law in ways not entirely alike but relatively analogous. Thus it is probable that if some one racial characteristic has had a certain importance in the elaboration of the law, others of the same nature ought also to have similar importance. This is, it is true, a somewhat loose, but a good enough application practically, of the principle that the same causes produce the same effects.

1: COMMON MISTAKES IN THE APPLICATION OF CLASSIFICATIONS TO CAUSAL INTERPRETATION. (1) But we cannot make a relation of causality result from scientific classifications themselves. It can simply be stated that present biological facts spring from former biologic facts; our sentiments and mentality of today, from our sentiments and mentality of yesterday; our present institutions from institutions of the past. Like does not necessarily engender like, the one is not necessarily the cause of the other. Thus it cannot be said that railway or automobile accidents arise from those of the old time stage coach, or that the Apaches of the suburbs of Paris are the descendants of the brigands of Calabria. There is a similarity in the causes and the effects in the different situations. We might group them together in a study of causes but there is no real relationship between them.

Nevertheless, entire systems have been based upon this confusion of natural and genetic classifications, and this

not by accident, but by design. All institutions of the same type have been connected by a bond of internal causality; thus our idea of property would be caused by the same idea in the past; it would therefore be entirely a social, juridical and economic entity. Each would develop through its own power of evolution. We believe, on the contrary, that cause and effect can and often do belong in entirely different scientific classes. When I propose to make a sale or a purchase, the clauses, perhaps new ones, that I insert in the contract spring from my psychological state, the state of the market, and the nature of the things which I wish to sell or buy, rather than from contracts of a similar nature which have been drawn up before. Accordingly, the history of the law does not seem to me to be a succession of juridical elements which have changed gradually, but an explanation of each element by the causes that produce it at each period and that will not be the same in the succeeding period.

(2) A still graver error in the application of classification to causal interpretation consists in instituting classes of phenomena which, in relation to others, always act the part of causes, and other classes which can only be effects of the first. Thus it has been said that the moral is the product of the physical, and that individual thought created institutions, or inversely, that the congregating of people in cities was the cause of intelligence. Thus the whole of history has been explained by economic facts. In reality, all classes of phenomena are capable of influencing each other reciprocally. To express this truth, some one hit upon the happy idea of replacing the word "cause" by "reciprocal influence." In considering them in so far as they are classes, "in abstracto," it can only be said that the law is the cause of manners or manners the cause of law. The two things exist side by side and act and react upon each other, by reciprocal influence.

2. METHOD ADVISABLE FOR THE HISTORIAN. But it is not possible for a historian to speak thus, for he is occupied with the concrete; he has to analyze this reciprocal influence temporally, and decompose it into a series of causes and effects. Every concrete fact of juridical life may be the product of complex causes; it is none the less an effect of what has preceded it, and a cause of what follows it. Any purchase or any sale of stocks which I may make at the Exchange will be the effect of former market prices, and will have its influence upon succeeding ones. *In abstracto*, there is a reciprocal influence of one speculation upon another. This will be the point of view of the sociologist and the economist. For the historian, there is a train of causes and effects which, if possible, ought to be studied separately.

History ought to attempt a genetic classification of events in so far as they are causes and effects, without taking account of their nature. There exist in objective reality some facts which are foreign to one another and others which are more or less related. The cause and the effect are in a relation of immediate affiliation. Two effects which depend upon the same concrete cause may have a natural resemblance to one another and possess some common characteristics. The common author, the common cause, can be discovered at two, three or even more removes, without the bond of relationship being obliterated. Let us borrow an example from Cournot in order to make a somewhat different use of it. Two brothers took part in the same struggle and were killed by the same shell, the two deaths have the same cause; they were not killed by the same bullet, but in the same battle, which is here the common cause of a degree farther removed; they were not killed in the same battle but in the same war; the common cause recedes to a greater distance still. It will grow more and more distant, if we suppose by turns that they did not lose their lives in the

same war, but had as a common vocation, the military profession; that they did not have this profession, but were constrained by the same event, and so on. Thus the historian can and ought to establish series, genealogies of facts of a different nature, which are connected by the bonds of real relationship and have a common author.

The objection will not fail to be brought forward that this study is very complex and impossible to realize even very partially. This is very true; it can only be a question of attaining it occasionally and in a very rudimentary fashion. But of what use is a labor of this kind, or to express it according to Molière, what is it that all of this can cure? This can cure some maladies quite effectively, especially vertigo which attacks the most reasonable man when he thinks proper to argue upon the good and evil effects of the law. Besides, practice has found by instinct the method which we expound, much sooner than theory has been able to do by explaining its mechanism. We wish to judge of a law or of an institution; a tree must be judged by its fruits; but what are its fruits? It has been accompanied by both fortunate and unfortunate facts; but which are related, and which are foreign to it? Must we see in it the consequences of the principle intended by the legislator, a combination of his principles with outside circumstances, or the product of an accidental cause of an entirely different nature? There might still be many other combinations to examine; the incriminated fact may have no direct relationship with the institution, and yet be descended from one and the same cause. If, for example, a lowering of the moral standard of a people should bring about, at the same time, modifications in the marriage institution and an increase in crime. The same method serves to estimate the value of juridical projects by the study of former laws and of their causal affiliation.

It is better that such an investigation be employed by the science of history even before its immediate applications are proved.

§ 6. *Causality and Chronology.* The effect is always subsequent to the cause. It has been denied that this is always true in the physical world. In history, the principle is incontestable. Philosophically, it ought to be immediately subsequent. There cannot be the shortest imaginable instant when neither of the two phenomena would exist. Beings cannot sink into nothingness in order to emerge from it. Accordingly, the cause-instant and the effect-instant are fractions so infinitesimally small that our minds can form no conception of them. Our intellect conceives things more in bulk; between two things that it observes, it permits an entirely neutral zone, inhabited by an incalculable number of intermediate facts which are true effects of the phenomenon creating, and true causes of the phenomenon produced. Between the taking of poison and death, there is a succession of stages during any one of which some one might intervene, by known or unknown means, and neutralize the effects of the poison. Only the last stage is the cause of death and not the fact that the poison has been swallowed, since practically the calamity could still have been avoided. In the juridical domain, a considerable interval of time will necessarily intervene between the moment when material circumstances present an idea to human thought, and that when what we extol as juridical cause influences the law. An intermediate period is indispensable to formulate the desire for the reform, to popularize it, to discuss it and finally to transform it into law.

But in order to justify us in neglecting true causes and true effects for distant causes and their subsequent effects, it is not enough to invoke our incapacity. Is not such negligence of a nature to distort the truth? That is what it behooves us to verify.

We may neglect intermediate states when they are all identical in nature and degree. It matters not how near to or far from the source I draw water from a pipe, and electricity running along a wire is identically the same at both ends. So with feelings and thoughts; certain ones are the same that they were yesterday and are to be found in a thousand minds in almost the same form.

Physically and morally, we may also immobilize a part of the cause for considerable intervals. A gun may remain loaded for years without losing its power of projection. Legal texts are forces which may await the moment of action a long time, — permanent causes which lie in wait for individuals who pass within their reach; to some they remain entirely indifferent, to others they bring success and to others still, destruction.

This state of apparent immobility which certain phenomena present, permits us to connect causes and effects in legal history across considerable distances, — to find again in our modern law, the influences of Roman, German and feudal laws, as well as that of various ancient and modern philosophies. But the intermediate states are not absolutely neutral and should be inspected.

§ 7. *History and Causality.* Is not history in a sorry plight in relation to the science of causes? Are not its complexity, its diversity, the intermingling of its various factors, and the difficulty of its lending itself to artificial methods of abstraction and experimentation, bound to discourage the most intrepid investigators and make the causal explanation of events appear practically impossible?

1: INDIVIDUALIZATION AND GENERALIZATION OF HISTORICAL CAUSES. Historians may take, and have taken, different positions in regard to the problem of causes. Some have refused to concern themselves with it. They have remained narrators; scrupulous and critical narrators, devoting all of their logic and their learning to re-

lating accounts which are irreproachably authentic, even in the smallest detail. These are the true founders of historical science; we are struck with admiration at the services they have rendered, but we ask ourselves why have they rendered them, why have they labored and why do they labor, since they have no consciousness of the value of their work.

Some bold thinkers have twitted them with it. "These learned men," they say, "are useful only to accumulate materials. By themselves, they can produce nothing. What is the good of knowing the length of human life if we derive no experience from the fact? Experience is formulated in general terms applicable to a great number of situations. The aim of history is to establish formulas which may be of use in the practical guidance of the life of the future and the scientific knowledge of human evolution. It should not be dismayed by the complexity of causes. One can study the action of the most interesting, and neglect the others. Investigation of frequent, general and typical causes is the aim of history. Under this condition it becomes a science."

This is not bad reasoning. But to confine oneself to the study of general and frequent causes, would be to disregard that in which history can be especially valuable to us, — to ignore, through prejudice, what it alone can supply to our thought and our logic.

This would, in my opinion, impoverish science and be dangerous to it. History is the science which strives most earnestly and constantly to draw nearer the objective cause, that is to say, reality. Reality is not cognizant of general causes, or is so only to the extent to which they have taken part in particular ones. It is legitimate, profitable and indispensable to generalize. The human mind must do so to encompass a part of the truth that is not too narrow. But the aim of science is what exists or has existed objectively, and not what exists only for us. The

individual is the inexhaustible mine of truth because it is interchangeable with reality itself, and we shall succeed in enlarging our knowledge by observing the production of a given phenomenon in all of its perceptible details, quite as much as by abstraction and generalization.

Generalization of causes is a most fruitful historic process. But it loses in "reality" what it gains in "generality," and can constitute but a transitory form.

The profound sociological work of our eminent confrère Pareto furnishes a typical example of this. The ideas of Livy, who might be called *the* naïve historian on the subject of historic causes, are there placed in nice opposition to those of modern science. How are we to explain that at a certain time in Roman history, plebeians acquired the right to honors hitherto reserved for patricians? Livy sees in this the effect of a small and entirely individual cause,—the rivalry of two sisters, one of whom was married to a plebeian, the other to a patrician. The modern historian smiles at the anecdote; even supposing it true, it would explain nothing. A people is not going to change its law simply to please a jealous woman. This gradual disappearance of the privileges of the upper classes under pressure of the lower, is seen in many other civilizations, and it is unimaginable that there were rival sisters everywhere to bring it about. The cause of the event is a general cause; we may formulate it in these terms: the ascensional movement of the élite, which transforms old aristocracies. Let us admit the authenticity of the two explanations; that the story of Livy is exact and the modern theory of the élite equally so. One does not prevent the other. What is the causal value of each?

The modern explanation is more fruitful; it adapts itself to a number of much more important situations. We very often see in history the élite succeeding one another, and very seldom sisters bringing about political transfor-

mations by their quarreling. It is also more complete, for the ascensional force of the élite can combine an indefinite number of small particular forces, while the Latin narrative is connected with but one of them, — a single wounded vanity the power of which is exaggerated. A great deal of exasperation and jealousy on the part of a great many people, joined with various other psychological phenomena, would have been necessary to have produced the effect in question. But the cause with the modern historian is less real, more subjective; the cause given by Livy more real, more objective. Upon this wholly special point, I cannot share the opinion of my illustrious colleague, who represents, nevertheless, the prevailing opinion. For an “ascensional movement” is an abstraction. And an abstraction cannot make its sister jealous, complain to its father of being humiliated or incite him to action, any more than it can descend into the Forum, free the law from injustice, enter into conspiracies, cause the people to hope for the abolition of debts or intimidate the patricians. It would have been necessary, however, for these or similar things to have been accomplished before the plebeians could have attained the honors. The daughter and the son-in-law of Fabius Ambustus, aided by him, were in a position to do it, and if they had not done it, other men and women in flesh and blood would have had to act in their stead. Besides, the modern school, in spite of its small relish for anecdotes, does not deny that the abstract and general cause is a composition of concrete and particular causes, but it claims that among the concrete facts which have preceded an event, there are some which make their appearance under the same form in all like situations, and which are accordingly important; that there are others which are peculiar to each situation and are therefore of no importance. With all the changes of the élite which have taken place in antiquity or in our own times, certain concrete facts of the

same nature ought to correspond. By calling them "ascensional movement" we isolate them and thus separate the wheat from the chaff.

2: OBJECTIVE AND SUBJECTIVE CHARACTER OF TWO OPERATIONS. In reality, by our act of abstraction, we have evinced the desire to make this selection, but we have not made it. In order to do it, it would be necessary to know what concrete or psychological or biological phenomena form a part of the cause which, among all peoples, make the higher classes fall under the pressure from beneath. We do not know these phenomena, or at any rate we have the right to speak of the "ascension of the élite" without knowing them. We have labeled some facts as real but unknown and resigned ourselves to our ignorance. This is an essentially subjective operation. Still let us admit that the term "ascension of the élite" represents to us clearly defined psychological and biological ideas: corruption of aristocracies by pleasure, and degeneracy through lack of selection. These ideas, a little less vague, would always be of abstraction and not of reality, of life. The real cause cannot exist without disputes between women or men, disturbances, insults, harangues, all that Livy reveled in, all that the modern historians believe ought to be eliminated. The latter do work that is scientific but essentially unreal. This is not casting a reproach upon them. The study of general causes has rendered and will render great service to history but it is entirely artificial and is of no use in the science of causes.

This is no reason to return to Livy. The study of the individual must be pursued not by anything less but by something more than general methods. The idea of cause and effect is far from being very clear in general philosophy. We have not attained it through experience; will not a longer experience give us a clearer idea of it? By studying the cause through more objective material, his-

tory can hope to render some service in this respect even to philosophy.

History alone can teach us, for example, how these molecules of cause become associated to produce a great event, how one of them may sometimes take the lead and, although of a like nature to the others, play an entirely different part.

In rhetoric, we have abused "the drop of water which makes the vase overflow" without taking into account the exact rôle of that drop of water. It falls at the moment when the vase is already too full; the water is out of bounds and can no longer maintain its position through molecular attraction. The position is still tenable, but at the maximum of tension. There is no room for the new comer, and it leans forward; but the general energy is destroyed by its example and its impulse. The effort, the tolerance, the desire for peace, the respect for tradition which could still have maintained the equilibrium a long time, give way; the vase overflows with its excess, and everything re-enters the limits of strict law. This is one instance of where a small cause produces a great event in human life and the history of institutions. But it is not the only one; there are those more frequent and more tragic where the vase does not overflow, but is overturned, for the human soul rarely preserves the impassibility and strict impartiality of an immobile vase.

Anecdotal history — even the novel itself — would never have excited the least interest, would never have been written, were not man instinctively interested in the many ways in which small causes act. Scientifically, I do not believe that he is wrong.

§ 8. *Cause and Origin in History of Legal Institutions.* There are, in history, some relatively simple facts the birth and development of which it is a simple matter to observe; there are many others, more obscure and more complex, such as customs, institutions and laws, which

are slowly formed under influences impossible to specify. Accordingly, the historian of the law, should, above all others, guard against the mirage of causal explanation and confine himself to expounding laws in their order and to develop their juridical meaning. Far from comparing them with the physical, economic, and social sphere, he should avoid any idea of this kind. To one who renounces the search for causes and effects, such comparisons are only inopportune digressions. As for any philosophic speculation, he ought to hand that over to historical sociology which, by means of the documents which it has collected and interpreted, seeks not the cause of a particular institution at a particular moment in history, but the general relations which exist at all times between juridical science and the other elements of civilization. The difference between the history of law and sociology based on history, appears to be that the former endeavors to arrive at a knowledge of the individual cause of each juridical fact, and the latter, at a knowledge of general and schematic causes. Is it necessary, as some think, to relinquish the first pursuit altogether?

1: INVESTIGATION OF INDIVIDUAL CAUSES OF JURIDICAL FACTS, OBJECT OF LEGAL HISTORIAN. The individual historical cause is no more difficult to discover than the general sociological cause. Unless it borrowed from other sciences, history by itself would undoubtedly never explain anything. One might observe gunpowder a hundred years, without guessing how it was made or that it was capable of explosion. One might follow the law in detail through centuries without discovering its origin, or its effects. Even general history, however presumably complete, where we see the various elements of civilization flourish side by side, furnishes only very uncertain relations of causality.

In order to be productive, history ought to rely upon a causal science, a study of causes grouped according to

their reciprocal influence. In regard to the history of the law, it behooves us to know what things act upon the law and how they act. Sociology will help us to understand this, but will not be sufficient by itself.

The application of the abstract formulas which it may furnish to concrete situations is a special labor. The history of the law has its special rôle in philosophy and its special causes; it has also its special method. The method of a science is based upon the degree of subjectivity which the objective cause undergoes through it. From this point of view, the history of the law is found to occupy a place between history and sociology. The sociologist selects only that part of the objective cause which can be expressed in an abstract formula, the historian, the whole of the objective cause, and the historian-jurist, what has left its impress upon the law. Let us take an example: It is to the energy of Napoleon I that the drawing up and promulgating in his time of the Civil Code are due. General history cannot neglect the authoritative acts which he occasioned thereby. They are of interest to legal history only if the emperor influenced the text itself, caused certain provisions to be admitted, and certain others to be set aside. Sociology will not occupy itself with this accidental influence in any case. It studies codification in itself, and what place it had in France under Napoleon, or in Germany under William II. The common causes and common effects of the two phenomena are for it the sole matters of interest.

The sociologist makes natural classifications of causes, the historian, genetic classification and the historian of the law should employ both. He ought, on the one hand, to group together the various circumstances which have produced feudalism or any other institution, in a country, and, on the other hand, the institutions which present traits of resemblance whatever may have been their causes.

But sociology draws nearer to the objective cause as regards the identification of cause and effect. Reasoning as it does, upon abstract ideas which it can analyze and simplify at will, it can show us more clearly how what appears multiple is nevertheless identical; how, for example, certain institutions, are at bottom but interest assuming different forms. The historian, who deals with more complex facts, will never succeed in discovering so accurately in what respect the parent phenomenon resembles its offspring, and the historian of the law will not even concern himself with it. The parallel might be pushed further if the search for causes in the history of the law did not appear sufficiently justified.

2: NECESSITY OF DISTINCTION THROUGH ANALYSIS BETWEEN THE OBJECTIVE AND THE SUBJECTIVE CAUSE. It must be confessed that in practice we argue at random upon the causes and origins of institutions but to no avail. This is due in a large measure, I think, to this confusion between the objective and the subjective cause. Objectively, everything that has contributed towards the making of an institution is a part of its cause by the same right. Subjectively, we may look at the matter from very different points of view.

We observe customs, institutions, and juridical practices, which have persisted without appreciable change for centuries, suddenly become very noticeably transformed through some outside influence. What is the cause of the new institution? Most assuredly, some will say, it is the new element which has been active and has changed the old element to suit its fancy. Accordingly, the social rôle of the law is here the real, the efficient cause. The true cause of feudalism was the necessity of establishing a cavalry, on the order of the Arabs. The pre-existing institutions simply served to reveal the technical process needed to obtain the desired result. We may, with quite as much reason, assert that the cause of

an institution lies in what has immediately preceded it. At the time of the military transformation in question, the system of land administration, the condition of the people, and the bond which attached those of lesser rank to the more powerful, assumed special form under the pressure of the necessity for defense; but the social state did not change abruptly. Juridical ideas and economic growth do not differ greatly from one moment to another, and in a great many details, the institution of one day is a reproduction of that of the day before. Must we not conclude from this that it is the same institution modified in some of its elements? The true cause of my individuality of today is my individuality of yesterday, even when I do not wear the same clothes.

The two opposed systems are incomplete. Can we say that they are complements of each other? This would still be too ambitious. A phenomenon as complex as feudalism has an extraordinary complex cause and may be considered under an infinite number of aspects. All of the theories concerning the origin of feudalism can be equally true, and others might be formulated which would be true also.

In reality, feudalism had no cause, for the very good reason that it did not exist. There existed feudal institutions each having its special cause, or rather each presenting an infinite number of feudal facts: contracts, usages, extensions of usages, laws, etc. In reality, each of these facts had a cause. We may speak of the causes of feudalism, but this expression will be essentially schematic and cannot serve as the basis of an argument. It would be of just as much value to discuss which one of several drawings made by five-year-old children most resembled a man in flesh-and-blood.

The more we analyze institutions, the nearer we may hope to approach the objective cause. Thus marital community is scarcely more definite than feudalism. The question of its origin is obscure, probably insoluble even,

because we unite different ideas in a single vocal expression: participation of the wife in profits, partnership between husband and wife, ease of liquidation of common property, and transformation of a benefit of survivorship into a right by which the relatives of the wife will profit. All of these ideas coexist in the conjugal community and constitute so many social aims, each having its particular causes.

The investigation of causes in the history of law ought to be essentially analytic.

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CHAPTER II

BIOLOGY AND LAW

§ 1. JURIDICAL FACTS NOT BY NATURE BIOLOGICAL

§ 1. *Juridical Facts Not by Nature Biological.* "From nature which is already history, one may pass without a break to human nature which is an extension of nature." This is not a rash assertion. The great history of life began before humanity and is continued in it. The destiny of man is no doubt of a peculiar nature, but he owes his prosperity to former stages of evolution. Still now and in the future, his psychology, his morality, and his customs depend and will depend in part upon the same physiological causes which influence other living beings. Biology is indispensable to the study of primitive man, of our original institutions, and of contemporaneous and civilized humanity.

There exist quite a number of biological phenomena which are the causes of juridical facts; but the juridical facts are not by nature biological phenomena. Each of these two propositions has been and is still misunderstood by certain groups of modern sociologists.

1: MONISTIC CONCEPTION OF UNIVERSE A SOURCE OF CONFUSION. The majority of those who have tried to merge law and sociology into the science of animate nature, without taking into account the fact that the former is concerned with immaterial, and the latter with material things, have been led into this error through a monistic conception of the universe.

It would be very beautiful from an æsthetic, and very convenient from an intellectual point of view, for the universe to form a harmonious whole, obedient to the same

laws and comprehensible by the same methods. General ideas are generous ideas, some one has said. Those who have thought that they have found in animate, and even in inanimate nature, the laws of moral thought are not to blame; the less so, since they are perhaps right. Their belief presents some appearance of truth, we might even say, it seems probable. But it is a metaphysical, rather indeed a religious belief, however pantheistic or materialistic. It results not from observation of facts, but from a general need of humanity to ascend by an act of faith to the first causes which logic cannot attain.

Moreover the heroic age of socio-biology is past. The splendid exaggerations of former days have been abandoned. One avoids speaking of society as an "animal"; one says "organism," or even "superorganism," which is no longer compromising.

Hardly anyone is concerned any longer with social anatomy and histology. Social and moral facts are acknowledged to be facts of a special nature; facts belonging to a life which presents itself to us under a more complex form and which must be observed by appropriate methods.

But can we not point out by simple observation, without an "a priori" affirmation of the unity of science, phenomena in the moral and juridical world which present the same characteristics as those in the world of animal life? The resemblance, the identity, is such that we are obliged to employ the same vocabulary to designate them. Thus minerals, vegetables, animals and men are equally capable of "becoming associated." The terms "differentiation," "adaptation," "struggle for existence," "parasitism," "division of labor," etc., may apply to certain conditions of human thought as well as to acts of material life. In the list of verbal substantives, many thus indicate processes that are at the same time biological and moral.

It is certain that the single fact that one and the same

term is applicable to various phenomena proves that they all possess a like element. This similarity is to a great extent purely subjective and is very often only a question of words. The proof of this is the difficulty which one has in keeping on firm ground when such comparisons are made.

The eloquent lecture once delivered by Professor Gide at Lausanne upon Social Parasitism has not made me change my ideas in this respect. If my memory is correct, his definition of "parasite" was broad to the point of exaggeration. Whoever did not exactly fulfill all of his social obligations, or procured for himself an advantage to the prejudice of others, fell into this category. Anyone who lounged around all the morning, bought a paper and went to dine at a restaurant was the parasite of the newsdealer and of the restaurateur, for while he was doing nothing, they had worked to furnish him with the wherewithal of living. Now the restaurant keepers, the best judges in the matter, are hardly of this opinion and care little what their patrons have been doing. The paradox was due precisely to the employment of the same vocabulary in different domains, to the comparison of situations which are not absolutely the same. Instead of synthesizing them under an ambiguous expression, it would be better to resort to the analytical method which would lead to a distinction between the several kinds of social and moral parasitism. The heir who spends his fortune lavishly is not the parasite of any of those whom he pays. That is more than certain. But is he not the parasite of his family or of society? This is the real question.

I do not say that it is prohibitive for one to make comparisons between biological ideas and moral characteristics under the same term, provided it is stated precisely what deduction is expected. No doubt, the dodder which sinks its suckers into the stem of the clover, the swindler

who exploits the credulity of the public, and the bon-vivant who squanders the inheritance left him by his father are in analogous situations. But is there really a common element in the cause of these different phenomena, a certain tendency of every being which lives under certain conditions, to economize his own effort and make his own existence dependent upon the labor of others? I do not know upon what an affirmative reply would be based. From similarity of appearance, we cannot deduce identity of nature.

Is it therefore a good plan to utilize these resemblances in the study of phenomena? To draw conclusions in regard to the characteristics of social parasitism from those of biological parasitism? Mr. Gide takes care to point out the danger of this. According to him, one profits by the exploitation, while the other falls into decay thereby. Nevertheless one can seek hypotheses there as elsewhere.

2: BIOLOGICAL PHENOMENA AS MATERIAL, SOCIAL, AND PSYCHOLOGICAL FACTORS IN HUMAN LIFE. We by no means therefore ask of biology analogies that are more or less symbolic as regards the interpretation of the history of institutions. When we discover in the various domains, division of labor or some other process of the same kind, it is a matter of indifference to us. We draw from it no practical nor philosophical conclusion. On the contrary, biological realities, to which man remains subject in so far as he is an animal, compel recognition in our method, if they have any influence in the formation of the law.

Of these phenomena which act in identically the same way from a material point of view among men and animals, three great classes may be noted: cold, heat, abundance, scarcity, and the nature of food, influence equally all living creatures. Reproduction follows the same laws: heredity, transmission of essential or accidental characteristics, effect of a mixture of blood, and importance of

race. Finally, history of mankind like that of animals is made by the continual elimination of certain groups and certain individuals by disease, and in the case of man, by crimes and civil and international wars.

But have these biological facts a sociological and a psychological influence? Should sociology and accordingly legal history take them into account? This has been contested, in more or less decided terms; absolutely as far as race and heredity are concerned, more indirectly, in regard to other questions. Three types of intellectual tendencies lead to the rejection of the biological influence (the likening of man to animals), even in the material facts which we have pointed out.

(1) Idealism sees in man a being essentially free, moral and intellectual. His psychological life is almost exempt from any physiological yoke. The world of ideas is independent of the physical constitution; it is open to all who try to deserve it by a little effort. All men have worth, and have more or less the same natural predispositions. No doubt, they may owe something to race and a little to their immediate progenitors, because they have the power of understanding what is right and of reacting against their temperaments. Institutions are established with an ideal in view; the judge and the legislator particularly are freed from all physical pressure. These ideas are not as out of date as one might suppose. Moral or political considerations have maintained them in science. Thus it has been maintained quite recently that biological influences have the essentially strange property of keeping men united without ever tending to separate them.

(2) Durkheim's school does not have the same illusions in regard to human individuals. In so far as he is an individual, everyone is dependent upon heredity and endures its consequences. But neither the law, nor any other social fact, is individual. It is the product of

the group. Thought which emanates from the group is freed from any physiological influence since it emanates from other thoughts and not from an organic body. Accordingly, race has no influence upon institutions. White, yellow or black peoples, at the same stage of development and placed under the same conditions, would produce exactly the same law, and yet in their private psychology they remain entirely white, yellow or black.

(3) Finally, a third class of writers neglect the biological factor in history because it would be too complicated to take it into account. Races especially are so mixed that it is impossible to reestablish even their remote filiation, and their psychological characteristics are so little apparent that there is no method by which they can be determined at all accurately. All attempts in this direction have been fruitless. Under penalty of wandering astray, such efforts must be abandoned.

None of these three courses of argument is convincing to us: (1) The logical consequence of the idealist theory would be the complete separation of the soul and the body. In order to react against the physiological influence, it is necessary first to recognize it, to judge it evil, and to have an ideal which is not even the product of its peculiar nature. Education and personal effort have some influence upon the nature of an individual; but they are not all powerful.

(2) The second thesis, which supposes the identity of collective thought among all peoples, creates from particles of real things, a thing that is neutral, abstract and devoid of character. Individual characteristics become combined in the mass but are not lost in it. Thoughts, actions, and laws produced by a crowd of intoxicated men will bear the trace of the intoxication which affects each individual.

(3) Finally, to those who are dismayed at the difficulty of computing the physiological element in human life, it

is enough to answer that we ought to take history as it is and not as we should like it to be to suit our particular convenience. Whatever is, is. We exert all our efforts toward understanding it, but we do not guarantee that we shall succeed in the attempt. The rôle of history like that of all science is to recognize clearly the gaps, not to conceal them.

We must now state precisely in what way the biological phenomena exhibited in humanity are able to influence its law.

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CHAPTER III

RACE AND THE LAW

§ 1. INFLUENCE OF RACE ON LEGAL INSTITUTIONS (1) THEORY THAT RACE IS FOREIGN TO INSTITUTIONS; (2) THEORY THAT RACES ARE REPRESENTATIVE OF INSTITUTIONS; (3) THEORY THAT RACE IS THE CREATOR OF INSTITUTIONS; (4) CONCLUSIONS.

§ 1. *Influence of Race on Formation of Legal Institutions.* There is little mention¹ of races in the history of law; and some think there should be still less. For when at times an attempt is made to explain a certain peculiarity in the law of a people by their racial characteristics, the explanation does not endure long. A little later the same peculiarity may be discovered among a very different people that has never been associated with the former in any way. General history gives a more positive character to its studies by individualizing by means of race, the groups of human beings whose acts relate, since these are different beings who have done different things. But the historian of the law who deals with abstract questions in time (rules of conduct which have in them no element of the corporeal) ought to be indifferent to the shape of skulls, all the more so since experiences demonstrate that given the same conditions, men nearly always do the same thing. The idea of race would therefore be from this point of view not only useless but dangerous.

This is highly possible. It is nevertheless indispensable to state precisely all that is implicitly affirmed by the historian-jurist who prohibits himself from pronouncing the word "race." Evidently he should affirm first of all that race is not a factor in the creation of the law. For

him, nothing in our physical constitution could make us prefer one institution to another. One is not born a republican or a monarchist, he becomes so by reflection or education. At no time in history ought we to suppose that a people faced with a juridical difficulty settled it in one way because it was dolichocephalic and would have settled it quite otherwise if it had been brachycephalic. By nature, men and groups of men are fungible juridical beings.

But more must be affirmed. Let us grant that between race and institutions there is no causal relation. But these two ideas, originally foreign to one another, have become connected historically, so that certain races which might have had entirely different institutions, have nevertheless had those of a certain type and have associated them with their reverses and their prosperity. Have not races which we suppose never to have been makers of institutions, been representatives of institutions? To exclude the idea of race from the history of the law, this must be answered in the negative.

This important question divides our sciences into three schools with the following principles respectively:

- (1) Race is totally foreign to institutions.
- (2) Races have been representatives of institutions.
- (3) Race is the creator of institutions.

(1) *Theory that Race is totally Foreign to Institutions.* By their method, the great majority of modern scholars belong to the first school. In their works races are like pawns in a game of chess; they derive all of their power from the place which they occupy, their individuality is of little importance. If the ethnological elements of a nation become modified, no account of the fact is taken; it is none the less the same nation, the same constitution, the same law which lives and is developed before us. The Roman Law is thus studied as a whole,

without taking into account either the diversity of the original races, or the diversity of the peoples who became merged in the great city. If those who argue thus were called upon to justify this method, they might not, perhaps, answer in exactly the same way.

Some consider that law is to a people what age is to individuals. Man is a child, an adult, or an old person, whatever his race. Thus from infancy to old age, all civilizations go through the same vicissitudes. The physical and moral changes which we undergo in life are identical for all men. Whoever knows one human life knows the broad outlines of every human life, and whoever knows the evolution of one system of law knows the evolution of all systems. Between legislations there is a difference of age, not a difference of nature, and, accordingly, not a difference of race.

To what extent is this an accurate comparison? All men are not of the same age, because they did not come into existence at the same time. But one cannot understand why all the peoples, at a given period, upon the surface of the earth have not grown up, prospered, and grown old at the same time. Is it not the inequality of physical constitution and of mental capacity which retains some in their primitive customs for centuries, while others develop rapidly?

Let us admit that there may be nothing in this, that peoples follow the same juridical road, and that it may not be their race which makes them progress with greater or less speed. It is none the less incontestable that the respective degrees of speed are very unequal, and that advanced races have been thrown into contact with retarded races. What has happened then? Has the juridical phenomenon remained independent of this ethnological phenomenon?

Other jurists who are opposed to the theory of races run against the same difficulty, but reach it by another

road. Humanity as a whole, think they, has the same juridical predisposition, and if different peoples do not create exactly the same law, it is because they are placed in different circumstances; they do not encounter the same difficulties. The peoples among whom women were scarcest and who had the most trouble in keeping them, became the first monogamists; sedentary peoples, those desirous of not becoming separated from one center, and for whom land thus situated had a particular value, adopted private ownership of land. The law being thus explained in its entirety by exterior circumstances, we have nothing to do with race. Whether there had been originally negroes or Chinese in the valley of the Po or the Tiber, Roman civilization and the evolution and the modification of its law would have appeared under the same forms. To the latter of these theorists, we shall put the same question. As a result of the different situations in which they have been placed, two races have different laws; and chance throws them into contact; what will be the result?

Is it imaginable that the fusion, the juxtaposition, the action upon one another of two legal systems is a purely intellectual phenomenon in which race is a foreign element? Are the most advanced concepts, or rather those best suited to the circumstances, going to triumph perforce unless the groups thus juxtaposed become physiologically merged? Did the "confarreatio" disappear as a form of Roman marriage because the patricians, without change of race, detached themselves from their traditions? or must we believe that patricians of more recent birth no longer had the same ancestral purity of blood? Were the old Romans capable of adopting all the innovations simply through interest or reflection, and was it possible for the new-comers to become educated in the traditional spirit and to preserve all of its good elements? If so, the origin of the masses which influence the elaboration and inter-

pretation of the law is irrelevant. Every one is qualified to work upon the edifice whose plan is arranged beforehand in the human reason.

This point is very difficult to admit unconditionally. Observation establishes it as an incontestable fact that man possesses a certain conscious or unconscious attachment for his institutions, an attachment of greater or less strength according to the branch of the law in question and the tenacity of the people concerned. So that under the form of a reasonable discussion, true racial struggles are carried on between peoples of diverse origin; and we shall not at all understand their internal dissensions without a knowledge of this difference of origin. Moreover, the progressive as well as the conservative spirit may depend upon race. When, through admiration of other institutions, a people changes its own, this is because it happens to be in a certain state of mind due to its past, and another people put in its place would not act as it does. The power of reasoning "in abstracto" without prejudice, of detaching oneself from the past, is not given to all. It is again a question of race.

So true is this that even granting everything that could be asked by the deniers of race, and in spite of every effort to reduce its rôle to the lowest minimum, it remains none the less an established fact that a juridical history which neglects race condemns itself to an incomplete interpretation of causes.

(2) *Theory that Races have been Representatives of Institutions.* There are, then, groups which have represented in history certain juridical forms. Whoever adopts a language becomes an agent of its propagation; whoever adopts manners or customs tends to make them known and widespread. At every stage of its history, humanity has presented varied aspects in this regard. It is perhaps given to us to consider civilized laws as the development of one and the same primitive custom; but the ancient

peoples little suspected this and believed themselves the real owners of their institutions. They were proud of them and clung to them tenaciously; for they attributed their origin either to divine favor, or to the wisdom of their ancestors. The history of laws cannot be detached from the history of the groups which have represented these laws.

Now down to quite recent times these groups have been racial. Juridical unity accords with ethnological unity. Even when several races are united to form a nation, each one preserves its own customs and it is only by degrees that a fusion is effected. Is such a fusion ever completely effected? It has not been proved that, even among the most unified peoples, those subjected since the earliest times to the same texts, tradition is entirely extinct, and that each race does not make of these texts its own peculiar uses. In any case there can be no doubt of this as regards the past. The principle of the personality of laws permits each primitive group to represent its traditions within the nation; the system of territoriality results either in a fusion of blood of the different elements, or in coercion by the rulers who impose their own legal conceptions upon the subject races. In this last instance, the subject races react and succeed in obtaining the recognition of their usages. These local customs become gradually fused into more and more general customs. The rôle of race seems to become reduced to nothingness. But even when one law absorbs another, this phenomenon of fusion cannot become detached from the respective history and psychology of those who were the participants, actively or passively.

(3) *Theory that Race has been the Creator of Institutions.* Let us propound one last question, the most doubtful and also the most important. Each human race has its own particular physiological aspect and we attribute to each race certain intellectual and moral tendencies; has

it likewise particular juridical tendencies, — a law which is its own, not simply because circumstances have made it so, but because it is best adapted to its psychology? Is race a factor in institutions?

Logic seems to say "Yes," experience "No." The law being a product of thought, if the race influences thought, it ought likewise to influence juridical concepts. And yet we cannot at the moment point out an institution peculiar to one race, which it has always and others never had. Neither does it seem to be any more firmly established that the laws of related races are always more alike than are those of races totally foreign to one another.

To be candid, no important conclusion can be drawn from these considerations. Blood, heredity, and physical structure do not constitute the only juridical factors. The most unquestioned agents in the creation of the law never act alone, nor do they always act with the same degree of energy. Thus the inhabitants of mountains and those of plains have institutions with no more permanent characteristic traits than can be found anywhere and at all times. Juridical comparisons conducted according to strict logic and with great regard for detail, are evidently necessary to discover the race-factor. It is necessary to inquire with logical rigor whether anything varies or whether anything is common when the race is common, and to observe as much as possible groups which are found to be in the same or a very similar state of civilization. Infants and infant peoples seem to resemble one another very closely and to be very different from old persons and old peoples. And yet every one of these infants could, in the diverse phases of its life, recall what one of these old peoples was at the same age; and not what another was. Thus ought we to compare civilization and legislation by taking into account the age of the peoples.

If they exist, these juridical characteristics of the races may not be as plain as the nose on the face, in the form

of a particular, complete institution, the exclusive property of a certain system of law. Every legal system is a combination of institutions, just as every man is a combination of intellectual and moral elements. To enumerate the various provisions which the texts contain, does not reveal the true physiognomy of a law. A certain trait of character may be preponderant in the direction of our life; the same institution may be met with in two different legislations, but play a very modest part in one and an important and over-riding part in the other. The idea of caste dominates all the elements of the Hindu law, and that of composition, the German "leges." Even in our modern codes, compiled at a time when theoretically everything that the legislator willed is presumed to have the same force, provisions are far from being of the same practical vigor, and equality of laws is as much a fiction as equality before the law. It is advisable, therefore, to compare legislations not only in their content but in their synthetic physiognomy.

It may be feared that it is difficult to substantiate this aspect of institutions, materially and objectively. Let us then study the texts in their concrete provisions, but study them with regard to the most minute analytical details. An institution observed in its general outlines may appear to us identical in several countries, but subjected to the microscope of analysis, it will seem to express very different desires and tendencies. Thus the French, the German, the English, and the Spanish systems of feudalism arise at the same epoch, play apparently analogous parts and correspond to certain common juridical principles; but studied in their application, they denote very different mentalities.

Why do we imagine that the characteristics of race in institutions are to be discovered on this or that side of the points where they are generally sought, — in the most general totality or in the smallest detail, and not in the

most apparent concrete facts? Because in this way the individuality of everything manifests itself. Men reveal their true character by quite small traits or by their whole lives, by a complete description or by the imprint of the thumb. And (to give the reason after the comparison), in juridical matters, peoples may adopt constitutions and laws because the latter have a certain amount of prestige or because they are judged good from a rational standpoint; in the general traits, circumstances counteract natural tendency. The whole and the details escape attention; everyone's predispositions develop therein quite unconsciously. One and the same code may be followed by different nations; but the provisions will not have the same chance to be developed in each instance, and in the organization of the innumerable details to which no great importance is attached, the different racial temperaments will be disclosed.

Thus there may not perhaps be much of a chance to discover the purely juridical characteristics of race. The differentiation will be rather of a psycho-juridical nature. Gobineau maintains that the Aryans and their purest representatives, the Germans, cherish the love of liberty more than other races; this sentiment prompted them in early times to counterbalance the power of kings by that of lords, and later produced parliamentary and representative forms of government; while the Semitic peoples retain (from their relationship to the negro) a docility of spirit which makes them flourish better under despotism and makes them instinctively transform the most liberal institutions into those of authority. The fact may be quite as false as true; for so general a conclusion cannot be drawn from a few superficial examples. But quite possibly there are influences of this kind exercised upon legislation by race. That is to say, a juridical study of races appears to us to be based necessarily upon a psychological study of races; so that we shall be inclined to

attribute to the race only those juridical tendencies which are interpreted psychologically. It would thus be hardly probable, for example — before a complete examination of the facts — that tendencies to imperialism, to universality, are, as Chamberlain thinks, the racial conception of the heirs of Rome, while nationalism is more in conformity with Germanic instincts, for in neither instance do we grasp the element of individual psychology to which such a tendency might correspond.

(4) *Conclusions.* Possibly, moreover, in the description of each institution and of its rôle in the whole body of the law as well as in its details, we should find nothing peculiar to the race. We shall say that this, the race, is not a factor in the concrete law. Juridical forms will seem to us purely intellectual, detached from the instinctive tendencies which differentiate men of different origin. They will be the product of general psychological forces common to all, and modified solely by the environment. But even in this case, the ethnological factor will not be excluded as a cause in law, for although it may be powerless to create forms, it may intervene effectually to bring about their adoption at a given time. If the stages are the same for all, what is the nature of the power to pass them without stopping or to prolong them? Let us suppose that, at some stage of their development, all people use the composition (or money-payment to compound for a homicide). According to temperament, they will be more selfish or more vindictive; for a monetary consideration they will be more or less willing to renounce vengeance, and will abandon private vengeance more or less readily.

Finally, even if races are beings juridically neutral, is the fact that they have remained isolated, or have become mingled, without interest for the law? Are there not institutions which are suitable to pure races, whatever their natural psychology, and others to mixed races, whatever

the elements of the mixture? The pure race presents a unity of character and of ideal, which permits it to be confined within narrower limits, and to become solidified for a common labor. Peoples of mixed races appear in history as disquieted by various ideals, incapable of laboring upon a single work and able to prosper only under liberal institutions. For such civilizations the problem then is to allow those natures which exclude or repel each other or have a profound and instinctive aversion to one another, the right to ignore each other sufficiently to be able to live side-by-side, to aid one another and even to collaborate. Here logic and history seem to be in entire accord.

The theory of races and its application to the law merits a detailed study if it is to give positive results; up to the present time every presumption is in its favor.

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CHAPTER IV

SELECTION IN AND THROUGH THE LAW

§ 1. PROBLEMS OF SELECTION.—§ 2. ELIMINATION AND SELECTION.—§ 3. THEORY OF THE ÉLITE.—§ 4. SELECTION THROUGH THE LAW.—§ 5. SELECTION IN LEGISLATION.

§ 1. *Statement of Problems of Selection as Related to Law.* All men have not taken the same part in juridical life and in the making of the law. Peoples, parts of peoples, and number of individuals have disappeared without leaving a trace; their juridical spirit and their customs have sunk into oblivion. International and civil wars, diseases and conditions of reproduction, have selected law-making humanity. At the banquet of juridical life, there were also a number of unfortunate guests who remained but a moment. And among those who lived and founded families, there were many who were more or less forcibly refused any part in the making of the law; they obeyed the texts and accepted judgments but left no imprint of their thought.

These physical and moral eliminations are numerous and incontestable, and undoubtedly the law would not be what it is if they had not concurred. The historian-jurist ought to ascertain and state accurately, to the best of his ability, what portion of humanity it is whose ideas have been preserved in the old texts.

Among certain biologists and sociologists this continual elimination is known as selection. It is not, in their opinion, the effect of chance but the result rather of a beneficent law which is at work among living beings. By selection, those whose existence would have prevented or retarded human progress are set aside. In the struggle for life, those who triumph are the best, the strongest, and the best adapted, and those who at the same time are best able to adapt themselves to circumstances and the law to

circumstances. Selection, as Darwin presented it, purifies and makes for the progress of the moral as well as of the physical world. If this is so, the historian ought to place it in the foreground of historic factors, because it is a question of explaining the evolution of the law and that of every other element of civilization. This chief problem in the domain of institutions raises two subsidiary questions. Are the different legislations which are the object of our study and which are all, up to a certain point, instruments of elimination, also instruments of selection? Do they protect the most fit to the prejudice of the least fit? Are there institutions which have had this character more especially and should we appraise their rôle historically in this respect? Such is the problem of selection in the development of the law.

Finally, ought we to improve our laws in this respect? Ought we to watch over the physical and moral progress of humanity by methods similar or analogous to those which breeders employ to obtain high-grade animals, choice fruits and vegetables? Such is the problem of selection in legislation.

§ 2. *Elimination and Selection.* The most effective process of elimination among human beings is war between peoples. The wars of olden times were often exterminators; peoples and towns were completely annihilated. Thus Rome could count as her assets the destruction of Carthage and of Corinth; also that of the Cimbrians, the Teutons, and many others who have completely disappeared. Epidemics likewise formerly destroyed entire races. In our times, wars and diseases do not physically exterminate peoples but they have an influence in modifying their internal composition. The victors as well as the vanquished lose part of their population. The struggle for life occurs between subjects of the same country; submitted to the same tests, some survive and others perish.

1. *Moral Elimination a Juridical Factor and a Biological Phenomenon.* Peoples no longer struggle for physical, but for economic, and political and, up to a certain point, juridical existence. The people conquered in war loses the means of enriching itself and of influencing the commercial world; sometimes it loses the right to govern itself. But more often still, while preserving a certain degree of wealth and political autonomy, its prestige is perceptibly lowered. Its institutions are avoided; it becomes discouraged itself and no element of its national spirit prospers. Thus classes and individuals who have been vanquished in the political and the social struggle continue to live; but everything goes on in juridical life as if they were not in existence.

This moral elimination is very interesting in that it constitutes a phenomenon which is quite as much biological as moral. It will appear paradoxical to assert that when a merchant becomes bankrupt or a district-attorney is dismissed for his political opinions, the fact in itself enters, through its characteristics, into human zoölogy before it is reborn into the domain of political economy and law. And nevertheless it is certainly an individual in flesh and blood, a physical being, a brain with individual and hereditary force, who is annulled. Now the elimination of a living being, even if its cause is abstract, even if the environment for which it no longer exists is abstract, none the less remains a biological fact interpolated between two moral and purely psychological facts. When I kill my dog because he has the mange or because he is not a good watch-dog, the character of my action is not changed by either reason, and if instead of killing him, I tie him up in a cellar where nobody can ever see him again, he will none the less have practically disappeared so far as the task for which he was destined is concerned. Thus moral selections, commercial struggles, quarrels between parties and classes, and professional intrigues and rival-

ries, all pertain to the social world, but constitute biological facts, since the existence of living beings is annulled in them. Although law is an intellectual and abstract thing, it is a biologic fact to recognize what sort of human animals are those who toil over the law.

2. *Natural Selection not a Demonstrable Truth, hence not a Factor.* We assert that phenomena of biological elimination concern the law, and we are ready to affirm that phenomena of selection do no less so, provided that it be made definite whether these phenomena exist and, if so, what is their nature.

When we speak of elimination, we mean that some human beings are driven out of juridical causation; but, we do not presume to say why this is so, or pretend to assert that the victors or vanquished have a good quality or fault, relative, or absolute. We simply state under what form the active juridical world appears in history. We see men who apply the law; there are those who frame legislations and others who judge them. Some do not make laws but would like to; there are others who make them because they are paid for it but otherwise care nothing about it. Some judge without wanting to, and others would like to but do not; and so forth. For all branches of juridical activity, certain ones are chosen and others rejected. But it is impossible for us to find the characteristic which distinguishes the one who is repudiated from the one who is accepted. Among those that are discarded we number as many good as bad fellows and vice versa.

If, on the other hand, we admitted selection in the domain of the law, our solution would be entirely different. Every triumph would be a proof of the superiority of the victor over the vanquished; not only would it be right for the victor to be preferred to his victim, but he would have rendered a service to humanity by overpowering him, by destroying the weeds that infest the field. From

these competitions and sacrifices, we should hope not only for the triumph of whatever is superior in mankind, but for the creation of new qualities resulting from the fact that, the good being always chosen and the others always eliminated, the products of these chosen individuals would become of a higher order day by day.

Therefore those who believe in natural selection affirm these three things: (a) that the victor is always, or at least most often, superior to the vanquished, (b) that the elimination of the vanquished is a benefit, and finally, (c) that it is a benefit not only because it prevents the endless reproduction of the mediocre and weak, but because it is an instrument of progress. It allows the hope that the victors of tomorrow will be superior to the victors of today, as the latter are in comparison with those of the past.

(1) *Alleged Benefits of Natural Selection refuted by Observation.* The first of these propositions is already a priori very questionable. Can it be verified by rational observation? No doubt, it may be asked what would have happened if Carthage had conquered Rome, if Robespierre had overcome Barras or if Napoleon had been victorious at Waterloo. Upon these questions we can exercise our imagination indefinitely, but the result will not be of the least scientific value. When we say that the triumph of the vanquisher was fortunate, do we not compare a thing which exists or will exist with a thing which does not and cannot exist, — a realized future with a future which will not be realized?

It is not that the operation is in itself completely impossible and illogical. If I could have ascertained fully all the qualities of the vanquished before his disappearance and, on the other hand, could have recognized through previous experience that these qualities would necessarily lead him to certain acts, I could reestablish

and compare these hypothetical acts, and estimate their value as if they really existed. The difficulty is precisely this, that we cannot have accurate enough knowledge of men to be able to judge from the past what they will do in the future. It is relatively possible for me to state that when I had a certain disease, I was benefited by one remedy and not by another; it is nearly impossible to assert with as much energy that if a certain man is elected a delegate to a convention, he will act better than his opponent. Everyone does not conform to the logic of his character. Would Robespierre always have remained bloodthirsty and Napoleon warlike? What can we know about it? Now, I ought necessarily to imagine what Robespierre would have done and compare it with what Barras did, before claiming that the triumph of the latter was fortunate.

Shall we try to employ an empirical method of observation? If every period of elimination were followed by prosperity and progress; if after every civil or foreign war, or after every epidemic, countries took a new lease of life and health, the probable conclusion would be that in these bloody crises they rid themselves of their bad elements, and that natural selection is not an empty word. Now it is precisely the opposite which seems established by the facts of history. Even when a people apparently emerges from such crises with new forces, it is often simply an illusion. The contrast between the bloody period and the peaceful period makes us see the country as more prosperous, or as much so as formerly. It is advisable, however, to make some reservations in this statement. We do not know what would be accomplished by a broad and detailed study of the reanimation of peoples by wars, massacres and epidemics, for such a study has never been made. It is certain, however, that it is not by this method that selection in moral phenomena could be demonstrated at the present time.

(2) *Alleged Benefits of Natural Selection refuted by Deduction.* Therefore if human and natural selection is not a truth which can be derived from experience, it can be established only by deduction, and it is legitimate to combat it by deduction. When two beings or groups struggle against each other, the victor always has a certain quality, that of having been the victor. The victory may be due to chance once, but not in the majority of cases. It is a proof of superiority, but of general or special superiority. In an epidemic of small-pox, the fact of having been vaccinated is enough to insure the victory; outside of this circumstance in life, it is a matter of little or no interest. If, on the other hand, a man escapes a disease because of the strength of his constitution, the same vigor which enabled him to avoid first danger will be a continual advantage through his whole existence. Because of this strength, his life will be longer and his work lighter.

Might there by chance be an invariable quality, readily defined, which would insure triumph in all moral or physical struggles? It is almost certain that there is no such quality. To be victorious on the field of battle, to resist epidemics, to win in bodily combat, to multiply one's race by seducing women, to build up a fine clientele, to be elected as the people's representative, to overthrow a minister and take his place, these are victories which demand quite different aptitudes. Intelligence and activity are undoubtedly useful under all circumstances, but what kind of activity and what kind of intelligence? It is a question of intelligence to take proper hygienic measures in time of an epidemic; but many imbeciles will think of such precautions and many intellectually superior men will neglect them and employ their faculties for something besides taking care of themselves at the proper time. We cannot cite virtues which are always useful and defects which are always harmful except in very imprecise terms which correspond to nothing real. Other-

wise, it must be acknowledged that according to circumstances, the large man or the small, the stout or the thin, the brave or the cowardly, the candid or the cunning, the intelligent or the weak-minded, the man of honor or the cheat, may be the victor or the vanquished. Superiority is purely relative.

This relative superiority has, moreover, a name. It is ease of adaptation. The victors are the best adapted, or those who possess the greatest suppleness in adapting themselves. It will be said that the struggle for existence leads to the triumph of the best adapted and the failure of those who are not adaptable and that, consequently, it is good. The principle is incontestable provided we recognize it as tautology, pure and simple. The victor is best adapted to all the particular conditions of the struggle, because by the definition if he were not the best adapted he would not be the victor. The Apache who assassinates a tradesman is best adapted to the environment of the outlying districts, but if the tradesman had had a good revolver and fired in time, he would have been the best adapted. Is the Apache adapted to our social order? Perfectly, so long as he prospers and does not allow himself to be captured. He would no longer be adapted on the day when we undertook to clean up the districts where he lives. Thus the adapted are not sacred beings whose triumph may be desirable for some reason or other. They are men who have the most varied good or bad qualities and who, as a result of chance, find themselves in an environment which is propitious to those virtues or defects. Perhaps tomorrow this particular environment will have disappeared, and no longer having an abiding place, these temporarily adapted ones will of necessity disappear also.

Thus selection does not work to the advantage of any moral or physical quality. It acts indifferently for all environments and has no unity of direction. It has no

mission to bring about or maintain any definite social ideal.

§ 3. *Natural Selection and the Theory of the Élite.* Those who believe in the Darwinian theory of selection have made a very ingenious application of it to a historic phenomenon.

1. *Darwinian Theory as applied to Historic Phenomena.* It is an established fact in the history of all peoples and of all times, that the same classes do not remain indefinitely in the upper ranks of society. Aristocracies are renewed by the rise of individuals who spring from the people and come to hold the foremost positions. This phenomenon is brought about in very different ways, but it is incontestable.

When the ranks of the aristocracy are not closed, the change is imperceptible. In proportion as there arises in the inferior classes an individual of talent, he proceeds by his own efforts (if Fortune favors him) to assume a position in the first rank. This evidently occurs to the disadvantage of an aristocrat by birth, but often without apparent conflict. When many individuals thus rise and cause their families to rise, it may be said that the élite is perceptibly, sometimes even completely, modified in its elements.

Most often, the upper classes oppose a greater or less resistance to this invasion. They repulse the candidate for success, refuse to welcome any new comer, and sometimes succeed for a certain time in maintaining a relative stability in the ranks of society. But when there gathers in the lower strata a crowd of malcontents who have all the requirements necessary to make them rise, such as talent, energy, etc., this compressed force, sooner or later, breaks down the social barriers. The change of the élite is effected through a revolution. The old aristocracy disappears and is replaced at one stroke by a new one.

It may appear quite curious that this phenomenon re-

peats itself indefinitely in all environments and it is legitimate to look for the explanation. The upper classes — according to a widespread theory — are driven from power because they have ceased to be superior. How have they lost their qualifications? and how have the lower classes acquired new ones? It is because selection has not taken place in the same way in the two groups. The rich are deprived of the benefits of the struggle for existence; they have few children. They take care and save the life of worthless human specimens. The poor have a great many children who grow up in any way they can, — poorly nourished, poorly clothed and under the worst hygienic conditions. And this is their good fortune. The mortality among them is high; only the strongest and best subjects survive and these in their turn have many children of whom only the best survive, and so on. It is comprehensible how, at the end of some generations, there arise from the lower classes quite remarkable subjects who have been all the more selected in that they and their parents have lived under the most unfavorable conditions. And this phenomenon is repeated indefinitely, because the situation remains indefinitely the same, — the poor man is always selected, while the rich one never is, and the poor one on becoming rich ceases to be so.

This theory has led astray some remarkable minds. Without admitting it as a certainty, many sociologists consider it probable. This is, however, only explaining a theory that is almost historical by one that is nearly biological.

2. *Opposing Arguments:* (a) *Change not mere Substitution of Classes.* Historically, the ascension of the élite does not resolve itself — even in its simplest expression — into a mere substitution of one class for another. A change of this kind is accompanied by a change in manners which become aristocratic or, more often, democratic. And these two events, the fact of the substitution

of classes and that of political transformation, are so intimately connected that we forget to distinguish between them.

He whom, to simplify matters, we shall call the parvenu, does not rise entirely by his own efforts. He is raised to power by the popular opinion which demands certain political changes. He is not indispensable, but he knows how to offer or impose his services, and as the reform must be made by him or some one else, he is accepted. Therefore he does not succeed in open struggle against all others, nor solely by his initiative alone. Having once succeeded, he does not work principally for the theories which he represents, but above all else for himself, and his family and friends; it is natural for him to wish authority to be great when it has become "his," while he wanted it to be feeble when it was not "his." From this arise those multiple contradictions between the youth and the mature age of the politician which are inexhaustible subjects of indignation and amusement. They are neither very reprehensible, nor very creditable. They are imposed upon him by the power of circumstance. He is not simply the gambler who said white yesterday with the intention of saying black tomorrow. He does not entirely deserve the contempt of numskulls nor the admiration of Machiavellians.

Besides, as a rule, this parvenu will not be able to restore to the authorities all the power of which he despoiled them during the period of his aggression. He does not possess the strength to reëstablish what he believes that he destroyed, and accordingly, he replaces the old élite to only a slight extent. "Barras is king! Lange is queen!" —so shouted the throngs for a moment. But Barras was not entirely king, nor Lange entirely queen, and this little pseudo-royal couple disappeared of itself.

Among certain writers there is an exaggerated tendency to reduce political movements to a simple conquest of

power by individuals or classes. If those who wish to attain superiority were really the strongest, they would have no need of a pretext to drive the aristocrats from power in order to seize their privileges in their entirety. But they do not do it, they covet only the remnants of these privileges. The ascension of, or the change in, the *élite* is always accessory to a large phenomenon, — a political transformation which is desired by many and becomes realized to a certain, though variable, extent in spite of everything.

It is indispensable that we also be absolutely accurate upon a second point in this question of the ascension of the *élite*, and that we give this last word a sufficiently clear definition. Is the *élite* composed only of those who govern or possess power, who are doubtless better situated than others to get the best there is in life, and who may be relatively likened to the victors? But are there not many other individuals or families who have as much wealth, moral influence and prestige, and often less care? It is difficult to consider these as the vanquished. Thus successful merchants, manufacturers, artists, men of letters and many others seem to form a part of the *élite*, since they have obtained what they desire, in fact, all that they could desire. In this sense, there exists a commercial, a financial, an industrial, a literary, and an artistic *élite*, just as there is a governmental *élite*, that is, those who occupy the foremost positions in the most important branches of activity. But then the historical fact of the ascension of the *élite* is no longer true. The upper classes furnish, relatively to their number, a tremendously larger proportion of superior men than do the lower classes. Statistics upon this point have been compiled which can hardly be questioned as a whole. It would be an exaggeration to conclude from this an inferiority of the lower classes, for it was much more difficult in former times for a son of the people to succeed and

gain recognition than for the son of a nobleman or a magistrate. But these observations render untenable the argument of a general and necessary degeneracy of families in high positions, and of a necessary and regular intellectual ascension of the lower classes.

(b) *Inconsistency in rate and method of progress, etc.* At the risk of seeing it flatly contradicted by facts, we must restrict the theory of the ascension of the élite to the governmental personnel which seems to us to be the most changing. In the populous classes and among those who have had a hard time in life, natural selection would develop the aptitude for attaining power. — Even reduced to these terms, it seems difficult to reconcile the argument with positive biological facts. Under the direction of the most skillful breeders, selection proceeds slowly. Experimenters sometimes have under their observation creatures which live and reproduce so quickly that thousands of generations may be observed. Perceptible changes are obtained by selection, but they are not as great as might be supposed. In practical breeding of domestic animals, the finest subjects are, of course, chosen, and the greatest care in the choice of the stallion improves the race quickly. But a certain degree of perfection once obtained, the species remains stationary, and selection is then often powerless to effect a repetition of the highest type which was produced by chance the first time. The phenomenon of sons unworthy of their fathers is as frequent in the best conducted and most carefully guarded animal genealogies as in the human species. Finally, selection is employed to obtain the simplest and coarsest qualities. To produce large animals this process is preferred to all others, but for the more complex qualities, the breeder seeks rather purity of race or a combination of crosses.

Displacements of the élite often take place with astonishing rapidity and in a proportion absolutely opposite to that of selection. The latter acts quickly at first and

later is practically at a standstill; the movements of classes which is slow among young peoples, becomes more and more rapid. When a society is in a state of decline, many have their turn, but the time for each is very short. They are hardly installed in the position of supremacy when the time has already come for them to think of leaving it; and — as a proof that selection is no factor — changes are often made in less than a generation. It is therefore impossible for the degeneracy of the one class and the physiological progress of the other to have had any influence.

On the other hand, the faculty of attaining power and of not making too sorry a figure in the new environment is a very complex quality which seems very difficult to obtain by a simple choice of the most robust children. I admit, if it is desired, that the children of the people have more health, more endurance and more energy, but these qualities are not sufficient to produce statesmen. Selection can improve their physical constitution but it cannot give them moral qualities which have nothing to do with the aptitude for coming unharmed out of epidemics, or with enduring cold and heat and poor food.

(c) *Facts must be interpreted historically, not biologically.* The ascension of the élite is not a biological cause. Historically and politically interpreted, the phenomenon no longer has anything mysterious about it. Everything in this world changes, and forms of government more than anything else. There is nothing astonishing in the fact that with new conditions, new men are needed. The qualifications for ruling are not the same for every period of history; the qualities acquired in the exercise of power do not long remain useful. The new élite arrive with new qualifications; they are more obsequious or more independent, possess more physical vigor or more mental shrewdness, more economic boldness or more order and discretion. The Germans of Tacitus needed a loftiness

of religious tradition joined with warlike independence; these jarls could not preserve the same authority under the Christian and already centralized monarchies of the early Merovingians. The "trustis" (said of those who consecrated themselves wholly to the royal service) created a new privileged class. In the feudal period, political and military worth demanded a certain ruggedness and physical endurance, combined with the faculty of knowing how to ally one's cause with that of the strongest and to join a certain pride and independence of conduct with a greater or less loyalty toward the suzerain.

In proportion as governments were established and the power of kings increased, these traditional qualities lead to the ruin of a great part of the ancient nobility. A clever courtier could not procure title and renown by being skillful in intrigue. This is also the modern understanding of home and foreign politics, namely, that services rendered to the country in new domains, such as law, commerce and industry, demand a new personnel. At the end of the old régime, the privileged classes claimed for themselves one of these three advantages: that of birth, of title or of renown. Each of these three words characterizes different classes of the élite; the nobility of the fief, that of the court, and that of office, which agreed only indifferently well, under monarchical government.

The élite of the French Revolution was very mixed, being composed of nobles, priest-nobles, priest-commoners, magistrates, physicians and butchers. The upper classes were, however, represented in much larger proportion than the lower ones, because the continual political agitation did not permit of the establishment of a stable form of government.

The Napoleonic élite, on the contrary, comprised entirely new elements. Military excitement evoked the success of individuals fitted for the new form of war, but only for that. Therefore at the Restoration, these

brilliant heroes of the previous day fell with frightful rapidity. The works of Balzac give in striking detail the successive disasters of these men whose virtues could not be utilized and whose faults became vices and sometimes odious ones. Baron Hulet, Captain Brideau, and Colonel Max, exclusive imperialists, retired on half pay or maintained in service, were eliminated by the same forces, in spite of all the prestige of their former heroism, because the sphere which was created for them was no longer their proper sphere. The levity of their manners and their rather loose morality suited a life of adventure, danger and self-sacrifice, but in the calm, bourgeois life which the pacification of Europe brought about, they could only continue an existence which was scarcely worthy or honorable.

An élite is seldom conquered upon its own ground, — in the qualities which form its *raison d'être*. But it cannot be indefinitely modified, cannot be equally superior under all conditions; and when new exigencies in the social life arise, its rôle is ended and it quits the first rank without ceasing to be what it has always been. Natural selection is foreign to this phenomenon.

This is not saying, however, that harsh and painful experiences and the obligation to earn one's bread cannot produce valuable qualities in certain individuals and influence their social destinies. But this consideration is entirely foreign to the subject under discussion.

§ 4. *Selection through the Law.* To those who believe that selection has played a part in human history, it is objected that man is not like any other animal. For a very long time he has formulated principles of morality and justice, has given proof of social instincts and sentiments, and has regulated his relations with his own people and with strangers, through the medium of legal texts. Morality, religion, and law induce the human being to live in peace with his neighbor, united with his

family, and in harmony with all. Man does not struggle for existence against other men; the sweat of his brow benefits others as well as himself. Humanity as a whole may labor in a common cause; its prosperity lies in union, not in contest. This ideal — so someone interposes — is not yet completely realized; but history brings us nearer to it day by day. In every instance, law, justice and solidarity are essentially philanthropic forces which in the control of human destiny tend to become substituted for the selfish forces of former times.

This optimism is not absolutely false as a whole. Neither is it entirely correct. It may suffice for practical morality. But a scientific method requires more delicacy and subtlety. It is true that there is no longer among men the same struggle for life which there would be if these much-lauded social virtues did not exist. The elimination of human beings is less brutal and takes place quite smoothly and according to rules of natural justice which are dear to us. There is no suffering, and sometimes there is even pleasure on the part of the vanquished. Those who drop into social nothingness are not even aware of it, and do not suspect the day when they will cease to live. The symbolic spectre leading the dance of death in the stained glass windows or miniatures of the Middle Ages has tied to its scythe the most varied and attractive ribbons. We cannot be too grateful to our own institutions for this.

But the struggle for existence, the destruction of human beings by other human beings, is as intense, perhaps more intense, than ever; and our good will is absolutely powerless to abate it, for it proceeds apart from us. Law, justice and morality have preserved the life of a great many persons, but in order to do so they had to cause the death of others. Social virtues have assumed control of human elimination, but have not suppressed it.

Political, juridical, professional, commercial, industrial

and literary struggles are such, it will be said, only in name. Victors and vanquished often vie with each other in courtesy, and a defeat does not entail the death of men. But this is simply an illusion, although it is very comfortable for us that we can entertain it. One is not generally vanquished at the first blow, he may hope to retaliate; the defeat is not necessarily irreparable. If it is not repaired, the vanquished does not know the exact moment at which he is definitely lost, and may entertain a certain hope all of his life. He does not experience the sorrow of the primitive warrior who, full of pride, sees himself forever humbled in a few seconds by a more fortunate adversary. But eliminations are not from this fact any the less real and complete. The vanquished die young and do not form families, or if they do, very uncertain ones; or they may be pushed aside, so that even if they do live a certain time, everything goes on as if they were not in existence.

Sociability, law and morality conceal but do not suppress the warfare. There are weapons which are defensive for certain beings but, for that same reason, offensive for others. Some live because of institutions, while others die from them, and the last are perhaps as numerous as the first. Can there be formed two groups, those of victors and vanquished which have other common characteristics than that of having been the victors and the vanquished? Can we discover among the former, one and the same virtue, and among the latter, one and the same fault which explains why the former have profited by the development of our abstract life and the latter suffered from it? This question is of capital importance to us, for if the law always eliminates the same type of individuals, this fact once established belongs to legal philosophy. If the contrary is true, a new task devolves upon juridical history, that of discovering the different kinds of human beings who must of necessity

have been eliminated in the course of time by the force of different institutions.

Anthropologists often say that a particular law or custom has brought about selection in a nation and that another has done so backwards. They mean to say that sometimes undesirable persons have been vanquished and eliminated and they rejoice in the fact; and that at other times desirable ones have been the victims and they deplore it. These expressions, "selection," "backward selection," are then purely subjective and scarcely scientific. But it may be deduced from this, that even according to the view of the theoretic selectionists, the law intervenes in the struggle for existence to eliminate sometimes those who possess a certain quality, sometimes those who possess the opposite quality. Now, since the most widely-differing natural tendencies can work to our advantage or disadvantage, it seems already quite well-established that juridical elimination can act in all directions.

But we shall not admit that the fact is proved until it has been examined more in detail. Besides it is important for us to understand not only the nature of the selection which the law as a whole can produce, but also that which is effected by its different branches. For example, it might happen that in all ages and societies, commercial law has developed the same tendencies, while rural or civil law acts in the opposite directions.

1: SELECTIVE EFFECT OF THE IDEA OF JUSTICE AND OF CONCEPTIONS OF PUBLIC ORDER AND LEGAL AUTHORITY. Ideas of justice and morality are factors in selection. When one civilization is inspired by a particular ideal, those who by their natural disposition are most inclined to understand and develop this ideal have an especial influence on their fellow-men. Such, indeed, is its most rational and apparent effect. But its rôle in history is far from being so simple.

Historically, the idea of justice is primarily a ruse which clever and cynical peoples employ to deceive more idealistic and, for that reason, weaker peoples. The Romans had the assurance to claim that they knew how to begin and end a war without departing from justice. They thought that they would thus reassure their friends for the time being. In their political quarrels, the Romans invoked justice upon every occasion. Cicero consecrated to it his most splendid periods. Now, the Romans in general and Cicero in particular, were very much concerned in their everyday life with right and wrong when there was a material advantage to be derived from it. But these grand and rather insincere declamations have had a very considerable moralizing effect upon Europe. Grotius still believes in their sincerity; he thinks that, although they sometimes deceived themselves, the Romans really wished to carry on only just and necessary wars. And if so powerful a people had so constant a care for justice, is it not because justice is, in itself, an element of strength and prosperity? This consideration has helped to make that idea popular and to make the originally artificial idea of morality a true force.

Thus through the ages, this curious struggle between matter-of-fact and visionary minds is continued. To uphold injustice and deny the ideal is to betray oneself and lose a part of the advantages; hence the really adroit politician or business man will guard against it. Accordingly, he will support principles which he regards as false, and his success will give them an authority which will be troublesome to those who may subsequently adopt his course of deception. He creates morality without believing in it, and for the very reason that he does not believe in it. The idea of justice is consequently an instrument of selection which may favor indifferently practical men or idealists.

The law, itself, in its most general form (the interven-

tion of any authority whatever for the purpose of giving orders to private individuals) is in an almost analogous situation. It is sometimes advantageous to obey, sometimes to disobey it. The law eliminates honest and conscientious persons whenever it prohibits more than it can win respect for. A contest between a person who thinks he must obey the law and another who does not think so, is an impossibility. The law becomes, on the other hand, a protection when its severity and its power are proportionate; when, for example, it prevents or limits fraud in civil or commercial transaction, not by theoretical prohibitions but by effective practical measures.

2: SOLIDARITY AND SELECTION. (a) *Theory of Contradiction between the Ideas of Solidarity and Selection.* There is a sentiment which finds expression in the most varied juridical domains. It may be given the name of solidarity, and it means that in the sentimental, intellectual, moral, philosophical, and religious life as well as in the practical, political, industrial and commercial, there has been developing among men for a long time a combination of fortunate tendencies. They wish to assure peace and put an end to rivalries, struggles and competition, even at the price of mutual sacrifice; and they are ready to work for one another, occasionally or regularly. And, under its higher form, this spirit of solidarity entails sacrifices and renunciation, on the part of the individual, of his own existence for the good of others. To be complete, lofty social sentiments (love, friendship, and patriotism, etc.) admit of considerable extension.

If we establish the fact that in the course of history this solidarity appears under a thousand different forms and in all societies, is not this sufficient to force the conclusion that for a long time man has not been a beast of prey in regard to his fellow-man but his companion and helper, and that the success of one is the success of the other?

At least, must it not be acknowledged that solidarity is the contradiction of the struggle for existence, that wherever one flourishes the other is obliterated, and that consequently if the philanthropic spirit became general, human elimination or selection would be arrested? This is repeatedly asserted to be so. What must we think of it?

(b) *Theory of Contradiction refuted.* It is said that union is strength. But what is the good of this strength if it is not to compete against someone and destroy him? And, in fact, all human associations ask for peace, union and sacrifice among the individuals and groups composing them, in order to be more violent, selfish and destructive toward other individuals and groups. Social virtues have undertaken the business of human destruction, and have perfected processes which, under this new direction, have become more and more exterminating. It is true that those who disappear are not those who would have disappeared without them. They thwart and arrest natural selection, and substitute for it a series of artificial selections which act in many different ways.

If we suppose a state preceding the first collectivity (family or tribe), the weakest individual was eliminated by the strongest. After the establishment of the first group — which to facilitate the argument we shall suppose to have been that of the family — superiority would be on the side of those who had the most highly developed family sentiments. The weakest and those who had the largest families would triumph over those who were stronger but had smaller families. It is very probable that those who had the greatest need of joining together, those who were the least able to resist individually, generally united first and most solidly. So that the vanquished of one day became the victors of the following day, precisely because they had been the vanquished. The effects of the selective struggle were thus reversed.

The solidarity of the State, or patriotism, springs from the fact that certain families which would be unable to compete successfully if they remained by themselves, unite and triumph over families that are stronger but have not known how to form themselves into groups. Selective force is again displaced. It causes the triumph of those among whom the love of State is more developed and that of the family less developed. Every time that a human association is formed, whatever its character, nation, city, municipality, professional association, religious society, trade-union, corporation, syndicate or commercial company its aim is to reverse the rules of selection as they are then operating, and to establish new ones. Therefore it is right to say that social virtues are instruments of selection, provided it is added that far from combining and complementing one another, they work against one another. This is even their principal *raison d'être*. To be a good father prevents one from being an especially good citizen. Every society which is formed in a commonwealth is directed against the other citizens of the same commonwealth and is accordingly incompatible with absolute devotion to the country as a whole. We conclude, therefore, that association always has the effect of terminating the struggle against the associated and of directing it against the non-associated.

This is, however, only a schematic truth, since the struggle, even between the associated, does not always entirely cease. It is continued in most varying degrees and under very different forms.

In strong family organizations, which constitute Le Play's ideal, the rôle of chief is acquired by competition between brothers, and the one who succeeds in obtaining it by his merits or his cleverness, almost completely absorbs the personality of the others. Numerous obstacles must be overcome before one can take one's place as the head of the family. On the contrary, there is no longer

internal selection when — which is most frequently the case — custom or law appoints the privileged one because of his age. He enjoys his rights without the least effort and without having given any proof of his worth. Many aristocratic legislations try to protect great families from vital competition, by creating a patrimony so encumbered by entails, and regulations as to majority, that it cannot be dissipated by the incapacity of the head of the family. Nepotism likewise expresses this effort of the family to protect one of its elements from the test of personal effort which he cannot sustain.

According to their extent, their constitution, and the degree of solidarity of their members and their political theories, nations allow individuals, families and societies more or less liberty in regard to destroying one another. Some take no interest in the struggle, and confine themselves to crowning the victors. By certain theories, it is considered advisable to respect the actions of individuals and allow the eliminations which result from them, if they result in the general prosperity of the country, but, on the contrary, to intervene, when the destruction of a group of a party, of an industry or a trade, threatens to impoverish the country. We still profess and put into practice, more or less, the maxim that the right of the strongest is sacred provided he be the strongest, not accidentally but through some permanent virtue. Subjects of one and the same state are not at all protected from elimination, so long as this elimination depends upon chance. Thus no matter what their personal worth, orphans would be worsted in life through the mere accidental fact that they had lost their parents in infancy. The State should protect them, as it should protect new industries, objects of luxury, scholars, men of letters and philosophers who are of no consequence in the struggle of today and who left to themselves would disappear, but who are the seed of physical or

moral beings capable of becoming the victors in the struggle of tomorrow.

The State may, on the other hand, propose as its ideal to put an end to all contest between its citizens and thus make them collaborators and not competitors. It is not for us to say whether this is possible or not. But history should take note of legislations of this character and state the results which they have been able to obtain.

We might pursue this study a long time by observing particular organizations. There are some in which the union of the members is complete; and others where the harmony is purely apparent. Men of the same political party, those who move in the same social circle, or members of the same professional associations do not always long from the bottom of their hearts for common prosperity. Their souls are divided between the desire of maintaining the solidity of the group which allows them to put up the strongest front against outsiders, and that of eliminating their neighbors who are their most dangerous rivals. It seems to us, therefore, futile to attempt to find a general formula which would characterize the relationship between solidarity and selection. Every type of association has worked differently at every period and should be studied by itself.

3: SELECTION AND CRIMINAL LAW. This branch of the law seems more especially charged with the work of selection. According to definition, is it not purifying society, to put to death, imprison or transport murderers, robbers and other individuals who form the dregs of the population, — to suppress the bad elements and, up to a certain point, their descendants, and to select with the precise intention of obtaining a better humanity just as the breeder discards defective animals in order to improve the race?

This operation may be more or less well conducted. Well conducted, it will produce the proper selection;

poorly conducted, an incomplete, insufficient, perhaps, insignificant selection. In every instance, to remove a malefactor from society is to better the social group from a moral point of view. This is a rather naïve truth; but we must not conclude from it that criminal law is always a more or less effective instrument of selection. To rid us of harmful beings is one of its functions, but it is not its only function. In order to evaluate the results which it produces, its good and bad qualities, it behooves us to consider its action as a whole.

Criminal law has existed from the day when some power, collective or individual, lay or religious, tribe, family, state, public or secret society, king or even brigand, first took charge of maintaining or helping to maintain the general safety. It punishes guilty acts directly or assists in repressing them. Thus it takes its place simply as an intermediary. In the beginning of its enterprise it recognizes the fact that everybody has the right to secure justice for himself, but that interminable conflicts between families of the same tribe are troublesome and should be limited and regulated. It simultaneously facilitates the application of the punishment and the maintenance of supervision. It is the power which chooses and applies the punishment; it insensibly monopolizes the right to punish. It combats private vengeance, because it may be excessive or unjust, but especially because such vengeance is a failure to recognize an authority which has been acquired with difficulty and upon which more and more depends. This monopoly of punishment becomes a constant attribute of sovereignty, desired not only by those who are capable of maintaining order, but also by those who are powerless to do so. It is not even unprecedented in political history, to see a good policeman supplanted by a poor one. In certain countries, the disappearance of highway robbery is regretted by the friends of honesty and order. They affirm that the public pow-

ers have destroyed organizations which most vigilantly guarded private safety and have replaced them with less honest and less capable ones. Let us not speak of the present. In the past, this must very often have been the case.

To maintain order, three organizations are necessary, (a) a good police which watches and arrests malefactors, (b) a good magistracy — in the broad meaning of the word — to prosecute with energy and sentence with clearness of judgment, (c) and a penal system which is really repressive. Primitive societies have poor police forces and insufficient means of proof; civilized societies generally have excellent police forces, magistracies — in the broad meaning of the word — which are sometimes mediocre, and penal tendencies which are very often deplorable. So that in the course of ancient and modern history, there are numerous periods when the official guardian is not a very watchful guardian, or acquits himself rather poorly in his function of restraining evil. But there is another function which he fulfills much better because it is easier and, to him, more interesting: that is to maintain his monopoly, to prevent the victim or his relatives from taking justice into their own hands, or, as it has been well said, to protect the guilty, the malefactor, against the honest man. Thus the criminal law has not regularly had, in history and in present-day life, the selective virtues which are attributed to it. We are going to give a little general sketch which, be it understood, is not intended to supplant the special research that should be instituted upon this point for each period and each country; on the contrary, this outline should show the impossibility of establishing a general principle in the matter.

(a) *Primitive Criminal Law not selective, but equalizing, in function.* Previous to all civilization, might was right and the weakest disappeared unnoticed. When men be-

came grouped into families or tribes, it was to the interest of the group to prevent itself from diminishing and to assume, therefore, the defense of its own members. Anger and self-interest drove each collectively into trying to inflict the greatest injury upon its rivals. But the families were nearly equally armed and so there was not a declaration of open warfare but each chose its own time and means. The most powerful, courageous, vigorous and innocent were as liable to succumb in this struggle of snares and ambushes as the weakest and most guilty. There was no selection, either physical, moral or intellectual, for no strength, strategy, or sympathy could protect anyone.

Criminal law has then always stood forth as the protector of the good, of those who create a disturbance only because they are driven to it. Indignation was aroused because these family struggles decimated the tribe, perhaps, also, because often those who were most unruly and had the least respect for custom and religious principles were victorious over their betters. But it seems that this first intervention of the State was not exactly selective. It is purely impartial and equalizing. One family had suffered some injury at the hands of another; it must be made to undergo an equal injury so that it might not become the stronger. There was no pretence of making good triumph over evil, but only of inflicting upon the malefactor the injury which he had made another suffer. Thus the law of retaliation is not selective, for the loss of an evil presupposes the loss of a good, so that at the final count there remain as many Cains as Abels. Certain legislations push this principle of equalization of losses so far that the idea of guilt is obliterated. The essential point is to inflict upon the aggressive tribe exactly the same harm that has been inflicted upon the injured tribe, and no more. If a chief kills a child, a young man, a woman, or some one of only secondary importance, it is not the

guilty criminal who is put to death, but some entirely innocent person of the same importance as the victim, so that the injuries suffered may not be heavier upon one side than the other.

(b) *Later Criminal Law as a Selection favoring the Bad.* By composition, the guilty party is freed in consideration of a sum of money. He remains alive and his family does not suffer any decrease. The equilibrium is destroyed to the advantage of the criminal. By this, selection is favorable to the criminal, unless the payment is heavy enough to entail the ruin of the guilty party and his family, and accordingly produce his indirect elimination.

Finally, when repression is exercised entirely by the State, criminal law favors, according to the time and circumstances, the families of the guilty as well as those of the victims. The epochs which we censure for their severity — their cruelty, we may say — those in which the criminal and his descendants were exterminated, when a person was hung for theft or the least other offence, only such epochs have attained selection in the right direction. Otherwise, in the struggle between good and evil, evil is necessarily always favored; in other words, there are many more honest men who die at the hands of malefactors than there are malefactors who are put to death by the State, and accordingly, the proportion of the latter necessarily increases. A penal system which prevents too great an increase of this proportion is already a splendid one and it would appear impossible to aim any higher. We must bear in mind this fact, that the guilty are not always easily discovered, and that once discovered, they have in their favor a whole arsenal of protection in the penal Codes and Code of Criminal Procedure. A body of scholarly, active men held themselves at their service. We cannot dream of withdrawing more than a very small part of the numerous advantages from the hands of rascals, for they are necessary in order to pre-

vent the honest man from being caught in his own trap and the innocent from being condemned in place of the guilty. And if we consider the insignificance of the punishment inflicted upon the few poor devils who allow themselves to be arrested and condemned (the law has exceeded the bounds of credibility in these matters) we wonder how we ever hoped for a single instant to make criminal law an instrument of selection, when it is entirely the reverse.

It has been possible for us to be deceived on this point, because writers on criminal law satisfy themselves and us with words and cause us to disregard realities. Ever since the time when the State first exercised in our place our right of private vengeance, we have forgotten the existence of this right. We see in criminal law only the State prosecuting a malefactor, and we ignore the other side of the picture, the State tying our hands to prevent our taking revenge for the wrongs we have suffered. One of Courteline's characters who has been beaten is very much astonished that his assailant clears himself by the payment of a fine of sixteen francs. He criticizes this sentence and receives two years in prison. That man had seen both sides of the picture and had experienced this truth (with which treatises on Criminal Law have but little familiarized the people), that the protection accorded by the State to the guilty party against his victim is more vigorous and effective than that accorded the victim against the guilty party.

This is said, be it understood, without meaning to criticize anyone. We state without blaming a condition of affairs which is perhaps satisfactory; we draw from it this theoretical principle that criminal law cannot select, that crime and its suppression can only be favorable to the development of criminal tendencies, if we suppose them hereditary. Fortunately, they are not always or necessarily so. Every class of individuals occasionally is crim-

inal. It is almost certain that the most moral and consistent man might, under certain circumstances, commit a crime. It is not positive that there are any born-criminals, those who could be recognized by physiological stigmata. This is not equivalent to saying that certain individuals cannot inherit a tendency to crime. But does this tendency to crime persist after several generations? This cannot be affirmed with certainty. Normal and fairly moral peoples have sprung from colonies of blackguards. So that if criminal law does not select, it is perhaps not indispensable that it should do so.

(c) *Political Penal Law involves no Process of Selection.* Up to this point we have spoken of crime as an act which inflicts injury upon another. There are also a large number of acts which are repressed by the State only in its own interest. For the State to be able to direct the general police and superintend the application of laws, it must constitute a being higher than individuals, otherwise it would have no more authority than an individual. There must be a special law prohibiting frogs from getting upon the top of the log, otherwise all frogs would mount without delay and the log would serve no purpose. Thus it is not possible to have any form of government, even the most rudimentary, which does not prohibit acts that are absolutely lawful, perhaps even beneficent and inspired by the best sentiments, but that are of a nature to throw into confusion the mechanism of the government as it exists. We cannot, of course, ask a government to retire because some persons maintain that it might be replaced by a better one. Inevitably, therefore, we find that there exists everywhere a public penal law over and above the other. Everything which, though harming no one, can bring misfortune upon the tribe or draw down upon it the divine wrath is treason towards the head of the tribe or the brigand who protects the country. Crimes of lèse-majesté, sacrilege,

criticisms (written or spoken) are acts which disturb the moral authority of a form of government, any insult to an official in the exercise of his functions, conspiracies, coalitions of (public) officials, seditious opinions, etc., are in this category.

This political penal law plays a preponderant part in penal law as a whole. This was formerly the case, admitting that it is no longer so today. The most considerable number of heads have fallen in honor of this particular form of law; and if, in our day, many venture to cut a man or woman to pieces and throw the remains recklessly into some city canal, when they would not dare to fling a pebble at the clock of a town hall, it is because they know how strictly offences against authorities are repressed, and how much indulgence may be counted on by those who confine themselves to eliminating individuals. For magistrates are and have generally been, before all else, officials in the service of the State, — a fact which does not prevent them from being well-informed upright men of high moral worth, who can sometimes be useful to private interests.

Those who most vigorously affirm the necessity of a government's defending itself, do not withhold their respect from persons who get worsted in political struggles but whose moral worth may be considerable. Revolutionists are not always the superior beings we are too often inclined to believe; but they may be men whose personal worth would entitle them to a better lot, and whose suppression does not constitute a high asset to society as a whole. Individual or entire groups are sacrificed at the will of a prince or for reasons of State, and experience teaches us that the hand of justice is not at all light under such circumstances.

Such criminal law involves no selection.

The majority of the penal legislations of Europe are more or less unsound from the view-point of politics or of

general morality. The French law punishes by a fine of ten thousand francs any one who declares himself a candidate for the deputyship in several districts at the same time, — an act which harms no one and can, in any case, have no effect. No one has ever paid this ten thousand francs; but why should we not be spared this ridiculous provision? In other countries, a suicide is punished and our colleague Kuhlenbeck, whose general principles of penal law are, nevertheless, commendable, asks for the punishment of certain acts which harm no one, because they are particularly disgusting. How many disgusting things there are in this world that justice cannot reach!

§ 5. *Selection in Legislation.* We have only to consider the idea of selection in order to understand the part which it may play in legislation. The practical side of law does not concern us; and when physicians, naturalists, or reformers come to propose the betterment of the human race by plausible legislative expedients, it is not for an historical work to criticize them. What we shall say is addressed nevertheless to modern projects without being irrelevant to history; for the idea of human breeding is very old, and the past seems to have realized it even better than the present, if such a thing were possible.

1: *Futility and Inefficiency of Institutions based on Selection.* Selective institutions are numerous enough in past legislations: such were the right of the father of a family to expose sickly or crippled children, physical examination before marriage, and systematic extermination of certain races or individuals. The selective institution never presented itself under the same steady and methodical forms through which man has been able to influence domestic animals and edible vegetables. And the reasons for this are those which are identically the same in every age, and the same answers can be made to Plato and the

most modern Utopians. From the one to the others, there have been many who have fashioned "Future States," and it cannot be said that they have gone on improving in intellectual value. Quite the contrary; a genius like Plato would not today conceive the idea of making a so-called ideal constitution and afterwards create the humanity which would have to adapt itself to this constitution. This method can no longer be represented among us except by minds which are not of the same calibre. A very slight acquaintance with science is sufficient to convince any one that, if it is possible to make institutions to suit men, it is not possible to make men to suit institutions.

Plato's project was not lacking in logic. But what it proposed as evident was essentially false. He believed that well-directed instruction and education could supply individuals with the necessary civic and moral qualities. He thought it possible to construct upon dialectics the Republic eternally ideal for all humanity. It was entirely natural that he should have conceived the project of forming, by selection, very robust bodies in order to store in them sound instruction in virtue. But now we can no longer make the double mistake of Plato; we know that there cannot be any society which would be ideal and absolutely suitable for all times and all places, and that it is impossible to make the man of the future, since we are ignorant of that future and of the qualities which would be desirable at that time. We know, moreover, that whatever may be its importance, education does not add a cubit to the stature, and that our humanity as it now exists does not present any harmonious relationship between the physical and the moral. Our civilizations demand an infinity of special talents, of exceptional virtues, in the face of which general qualities count for little. It would be childish simply to imagine that we can calculate the qualities which will be most useful

within the next generation. Technics become transformed very rapidly and one who has all the qualities necessary to carry on successfully a profession at the present time would, perhaps, be completely displaced in the not distant future.

If we knew into what path humanity were to be directed, even then selection would be a very imperfect instrument. It is an extremely slow process of racial betterment, and one from which we must ask very little. To produce an appreciable effect, it would be necessary to combine it with the race; to seek purity of race as much as individual qualities, and to try and make human crossings with a view to producing derived races which would have certain peculiar qualities, but to suppress products that might not be successful (which is most frequently the case) — in short to do all that serious breeders do. Otherwise, it would be absolutely impossible to hope for any result whatever.

The law therefore must renounce the creation of choice individuals by means of selection. Such a scheme would collide with moral and material impossibilities, and not to understand this is to ignore completely all questions of breeding. But in order to prevent the degeneracy of a country, is it necessary to eliminate individuals who are morally or physically injured and prevent them from reproducing? This is necessary to a certain extent, but only to the extent that has always been practiced up to the present time.

2: *Right and Justice as involved in Selective Institutions.* The right of suppressing those who have killed others has always been recognized, since it has been proved that they would constitute a peril for all humanity if they were allowed to go free. As for the hunch-backs, the blind, and the infirm of every kind, we pity them but never dream of suppressing them. No doubt, if instead of the idiot who begs at the door of a café, an intelligent,

robust being had been born, the collectivity would be better off, and we should be partially benefited by it. If he were capable of helping the cook, our beefsteaks might be more perfectly done to a turn and our coffee better prepared. We are all interested in raising the human level, but we have no rights in it. And if theorists strive to discover by what principle I can demand the destruction of one who has shown his intention of destroying me, how can they establish my claim to the non-existence of a hunch-back, under the pretext — a very questionable one besides — that if he did not exist I might enjoy some superior material or intellectual advantages? Theories upon the right to punish have missed the path of abstraction where thought is rigorously directed, and fallen into phraseology where it is dissipated and remains powerless. It would be fortunate if it were possible to render such theories more positive by the theory of selection. Unhappily, selection is only a word which can satisfy neither the most elementary logic nor the most brutal realism. To say that society punishes in order to select is not to strengthen its authority, for if we do not know where we get the right to punish, suppress, or lessen the number of those who have occasioned direct and unquestionable injuries, where, indeed, can we get the right to select and suppress those who have wronged no one and perhaps never will? If professors of criminal law had to write a chapter "On the Right to Select," it is probable that they would renounce every theoretical argument that had become absolutely untenable, and find themselves reduced to the conclusion, "We select because it is useful."

Now this selecting might be neither useful nor beneficial, because degenerates may quite as well be superior as inferior. These little stunted and, perhaps, even deformed, beings are perhaps representatives of a particularly civilized and pitiful humanity, which is capable of

restricting its horizon and enclosing a certain intellectual capacity in something which costs very little to feed and house.

The reconciliation between justice and legislative selection does not seem to me to have been expressed in practical terms. The applications proposed are either scarcely selective or entirely unjust. This last qualification may be applied to every measure which would shackle, directly or indirectly, by threat or advice, the liberty of action or of propagation of individuals who have not violated the penal law.

When it is a question of individuals who have been found guilty of offences and crimes of a nature to harm others, it would then be lawful to take advantage of the occasion to give satisfaction to the partisans of selection, without wronging the principles of justice. It would even be possible to give them more authority by observing the principle of selection. It would be necessary, as has been suggested, to add medical to legal jurisdiction, so that those who escaped legal sentence on the ground of irresponsibility, would fall under medical sentence, which would be less morally and physically painful, but a better agent of elimination. If we must facilitate the restoration of the accidental criminal after he has been made to expiate his fault, it behooves us not to make the born criminal who is not responsible for his actions suffer uselessly, but to annul definitively his existence by preventing his return into society. Thus the institution of medical penalties would be a benefit to the law; through them, there would disappear those insipid and interminable discussions upon the responsibility of the accused, and those dangerous acquittals, — wrung from the weakness of a jury to the advantage of beings who are essentially harmful, but who succeed in regaining their original social position, while others who are less guilty and better balanced are forever excluded from it. But

medical penalties would not be beneficial, just, and juridical, except under the condition *sine qua non* of their being reserved for the accused for whom was pleaded irresponsibility or the weakening of responsibility, consequent upon their mental state, or who had been officially submitted to conclusive expert authority in the matter.

This example proves that there is no incompatibility between the biological and the purely juridical idea to which the considerations explained above pledge us to remain faithful. But the idea of selection cannot suffice to constitute the theoretical or the practical basis of any part whatever of law.

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CHAPTER V

SOCIAL PSYCHOLOGY AND THE LAW

§ 1. *Psychology, Social Psychology and Legal History Distinguished.* We have admitted biological facts among the causes of the law. They are not, however, its immediate causes. They select the living beings who take part in juridical development; they influence the thought of these beings and determine to a greater or less extent their intellectual qualities. But between the physiological phenomenon and the birth of a law or an institution, human thoughts must necessarily be produced. The law is the effect of the expression of certain of these thoughts. We shall seek in them the psychological causes of the law.

Psychology has been defined as the science of individual facts of consciousness. Every psychological fact is an organic or cerebral work concerning which the animal or the man who performs it has a more or less complete consciousness. By the word "individual" we mean to place an important restriction upon the definition. If this cerebral work, accompanied by the same degree of consciousness, is brought about by society, if it is produced in an animal living with other animals, under a particular form that the work could not have had if this animal had lived in isolation, it would no longer constitute a psychological, but a social phenomenon; it would be the object of study of another science, of the science of facts which result from life in society, that is, of social science, or sociology.

If this definition were taken literally, it might be feared that psychology would become not much of anything,

perhaps, even nothing at all, and would die out for lack of an object. For it studies above all else the mental operations and sentiments of man; and since man has always lived in society, he would not, had he remained isolated, have the same methods of reasoning and the same affections which we now find in him; so that if we studied the love, the friendship, the avarice, or the power of abstraction or of generalization of modern civilized man, we should be engaged in sociology and not psychology. On the other hand, sociology is a very young science, still but insufficiently determined. It has produced a great number of works, inspired by different principles and not observing the same attitude toward the old individual psychology. Facts of consciousness are studied therein, but likewise, many other facts of a very different nature, so that the proposed terminology is essentially vicious and could only lead to confusion.

Let us therefore say that psychology is the science of *all* the facts of individual or social consciousness; but as it is allowable to study man as we see him without concerning ourselves with his past, to observe to what extent his mental life depends upon his physiological, and to criticize his forms of reasoning, some of which lead to error, others to truth, we shall distinguish an individual psychology which will set aside the fact that man is a social being. For those who, on the contrary, wish to discover in what respect man is dependent upon his environment and to determine how various forms of society have influenced our sentiments, or, indeed, even how the actual individual becomes changed through contact with his fellow-men, we shall reserve the expression social psychology.

The majority of sociologists are engaged in social psychology. They thus reveal new forms of thought which the observer of the detached individual cannot discover; they also throw new light upon the origin of our

feelings and our ideas. By virtue of the establishment of the double truth that human thought is the product of institutions, and institutions the product of human thought, the legal historian cannot neglect this part of sociology without leaving an important gap in his work. This is not saying that he ought, even for the length of a single chapter, to become a sociologist and erect a new structure in a country where architects and builders are not lacking. To discuss facts which have been pointed out by the social sciences does not amount to discussing the sciences themselves. Each sociological system is a totality of axioms, experimental verifications, and principles of method; it might be possible to encounter poor observations in a good system and good observations in a bad system. The history of law remains different from sociology even when it deals with the same matters. In the former, we study particularly the causal bond which may connect certain phenomena, while sociologists observe rather the phenomena themselves, classify them, group them, and seek their uniformity. We, on the other hand, are preparing to make the analysis of particular causes by a theoretical analysis of the uniformities which are presented to us. Good tactics for a historian might be bad ones for a sociologist. Thus our analysis of social psychology as a juridical cause is not sociology.

The law is a social fact by reason of its function. It estimates the mutual interests of persons destined to live together and does this with all the more minutiae as this common life is continuous and intimate. The tendency of the law is to express sentiments of sympathy, or, at least, of sympathetic indifference, and the desire to live in peace and harmony with one's neighbor. Finally, it is social in the method of its elaboration; it is promulgated by human assemblies or by individuals who are the influence of their social surroundings and who, in every instance, whatever their intellectual independence, owe to

their individual or hereditary education the power of prescribing laws to their fellow-citizens.

§ 2. *Psychological Relations between the Individual and Society.* For the moralist to preach modesty and solidarity, nay, even fraternity, to the boastful individual who is too much inclined to believe himself self-made, it is sufficient to show how every one's material life depends upon other men, upon social organization. Sully-Prudhomme's dreamer who believed, for an instant, that he was reduced to making his own bread, his own clothes and his own dwelling, received a wonderful lesson in philanthropy. But this material dependence of each upon all is completely foreign to our investigations. It is the intellectual or psychologic dependence of man upon the social group which alone interests us, and in this respect ideas are particularly confused. Social bonds are numerous and of a varied nature. It behooves us to disengage a few of the most important types.

1: INDIVIDUAL SENTIMENTS HAVING THE COLLECTIVITY AS THEIR OBJECT. Sociability is a feeling of pleasure which the individual experiences in forming part of a group, in living in common with other men even when the needs of the material or the intellectual life do not demand it. This sentiment exists, in our time, in varying degrees, in the breast of nearly every human being, whether child or old person, and plays an important part in life. It is collective in the sense that through it we have an affection for a certain form of solidarity much more than for the individuals which correspond to it. One clings to his own fireside, but is quite ready to leave it to form another; another likes club life, but this will not make him regret quitting the one which he has frequented for many years, for another where he will no longer see the same persons, if he finds there the same customs; there are some patriots who are much more concerned over the honor of their country than over the life of those

who compose it. Every day we are treated as "Dear fellow-citizen," "Dear fellow patriot," "Dear comrade," or "Dear colleague" by men who are fond of us in so far as we are members of a certain group, but will not weep much at our funeral.

Philanthropy, altruism, charity, and humanity have the individual for their object and not a collectivity. But they are addressed to man because he is man, and they neglect, on principles, his individual qualities. They treat him as something fungible, and it is not very pleasant to submit to them. "It is better to excite envy than pity," say we with the profound Mme. Jossierand, who in Zola is the incarnation of the most positivistic conceptions of life.

Although the person who envies us, detests us, and he who pities us, sympathizes with us, we prefer the first because he considers us more individually and degrades us less in our own eyes than the second. Philanthropy is not objectively collective; it is in regard to its object a neutral individual sentiment.

In every respect, the sociable and the philanthropic man are two entirely different beings. Sociability corresponds to affection, esteem, hate or contempt. There are individuals who have a horror of solitude, cannot remain five minutes with their own thoughts, and need others to keep them from being bored, even though there is no congeniality between them.

Romantic literature brought into prominence a type of sceptical hedonist who parades "his superb scorn of the dead and the living," but who takes care to do so in places where people see it and are amused by it. We are acquainted nowadays with the worldly anarchist who hates the society by which he benefits and without which he would not exist. The sociable and the philanthropic are not the same and do not run across one another in the same environment. More of the latter are found in

the scholar's study, in isolated vicarages of ministers of different religions, or even in the kitchens of old maids, than in parliaments, exchanges, drawing-rooms or even charitable societies. It seems that in order sincerely to love humanity as a whole, it is better not to associate too closely with groups that are over large. Between the two sentiments, one of which makes us love men, the other the society of men, there is evidently no necessary incompatibility. In any case they are quite different, and we do not always make a clear enough distinction between them.

Both are, moreover, individual as regards their subjects. They exist in everybody to varying degrees, and, equally personal reasons develop or atrophy them. To be friendly, patriotic or kind to one's neighbor is a question of character. Circumstances entirely peculiar to the life of each, success or failure, good fortune or bad, illusion or disillusion, induce us to live in the outside world or cause us to seek retirement. Nevertheless, as is the case with every other individual sentiment, philanthropy and sociability may, in exceptional instances, owe their birth to a collective impetus. Patriotic impulse may drag men very indifferent by nature into contact with a patriotic crowd.

The origin and the historic rôle of these two sentiments are still doubtful. Did man, as was formerly believed, establish families, tribes, and states because he was sociable and was, owing to his psychological constitution, bored by being alone? In our day we are rather inclined to believe the contrary. Our sociability would arise from former habits, and the social groupings which we effect would result from causes less known and probably more material. At present, the question is absolutely undecided.

2: INDIVIDUAL PSYCHOLOGY CREATED BY SOCIAL LIFE. The human heart and brain are not developed in solitude. We are made in the image of the social environ-

ment through which we and our ancestors have passed. If these ancestors lived, and we were still living, in caves, we could possess neither very profound knowledge, refined feelings, nor powerful logic. Knowledge, wit, talent, and genius are formed by social contact.

This is no reason to believe that noble influences are at work in the electoral mass, and that fireworks should be set off in its honor. This social contact which inspires the individual energy or "élan" does not do so by furnishing directly ideas and sentiments which have been more or less fashioned in common. Nothing resembles less an intellectual collaboration than this action of men upon one another. Nevertheless, it is often quite right to affirm that ideas are, as it is said, in the air, and that genius is a product of environment.

(a) *Education by Competition, as a Fact of Individual Psychology.* Let us suppose that the same problem is put to a great many people. If the problem is very simple, everyone will solve it and accordingly no one will acquire any celebrity; if, on the contrary, it is very difficult, if many try to solve it without success, and if a brain more powerful than the rest proceeds to bring forward a solution and this solution is unquestionably the right one, he will be considered a genius. The problems which are and have been put to humanity are of a varied nature, — technical, philosophical, æsthetic and juridical. In all these domains, there are questions which are of interest to a number of persons, the whole nation, or even all civilized races. A successful solution will procure the most immediate and brilliant rewards. One may then delude oneself, up to a certain point, with the idea of a collective work of which one man is the fortunate beneficiary, and this is not absolutely false. The interest of the public is at first a stimulant for the worker and, consequently, an aid; all those who have contended with the same difficulty have traveled a greater or less distance on the road to truth, in

company with the prophetic genius, and therefore have collaborated with him up to a certain point. Finally, the same question having been propounded to a considerable number of brains, it is not astonishing that there are found among them a few of equal power who independently of one another give the correct answer at the same time.

There are other problems which may be more difficult than the first, and of a broader scope, but are of interest to only the smallest possible number of persons. Up to the time when the public interest is attracted to them for one reason or another, those who solve them enjoy no popularity. These unrecognized geniuses are the absolute proof of the individuality of scientific, artistic and literary work. They cannot get their ideas from the masses since the masses are ignorant of or scoff at them. Nevertheless, they, like popular geniuses and almost to the same degree, are the products of their environment. The environment, the circumstances of their external and social life, state the equations which they have to reduce. Their labors, generally quite unappreciated by their fellow-citizens, who are as much strangers to their (mental) preoccupations as a camel would be to the North Pole, express, nevertheless, the relation which exists between the cerebral power of the worker and that of the masses. These geniuses are not, therefore, independent beings, for their productions would be influenced by any variation affected in the general intellectual level, even though there existed no resemblance, harmony, or understanding between these two elements.

Take as an example the litterateurs of the Parnassian and the decadent schools. The majority of them led mediocre or wretched lives; their books were not bought nor their plays acted at the theatre. They had not, and still hardly have, anything in common with the crowd. Nevertheless, the majority of young men of talent of the same

period, even without knowing one another, express the same tendencies of correction, investigation or sensibility, which appear wholly exaggerated to the public at large. The number of Parnassians and decadents does not signify that they are a product of the masses, with which they have nothing to do, but that they are a product of the environment. That is to say, that certain writers who had reached a certain degree of intelligence and æsthetic taste, could no longer find refined enough artistic pleasure in old works. Brought face to face, through literary environment and public taste, with the same problem, viz., to escape what was to them the commonplace in thought and expression, they gave, independently of one another, very similar solutions.

Social environment signifies the totality of social things with which the human being is surrounded from the cradle to the grave, that is to say, with other men and with the things which those other men have created. The individual, through choice or necessity, is subjected to this new environment and is, up to a certain point, its product; although he preserves entirely at the same time the power of hating it, of decrying its merits, or of working in a direction contrary to the general collective work. It acts quite as well by reaction as by action, by repulsion as by attraction. We need ipecac which nauseates us, just as much as the most appetizing and digestible soups. Likewise, those who maintain that almost all of our intellectual faculties are of social origin, are not absolutely wrong in recognizing that our fellow-creatures have often been of service by being for us and our ancestors, an endless source of weariness, vexation, pain and fear.

Man, some one says, owes a great deal to other men for having been much annoyed by them. Savage beasts, intemperate climates, and diseases would not have been scourges severe enough to have awakened his intellectual power. An enemy worse than wild animals, famines, or

pestilences was necessary, and this enemy he could only find in his fellow-man. The vanquished has gained more than the victor from the social life because he has suffered from it more. To find food and defend themselves against natural forces, the intellectual stage of the higher animals is amply sufficient. The superiority of the human animal can only be understood by the necessity which has compelled him to struggle against obstacles which other animals did not understand. These obstacles could come to him only from social life. The logical conclusion of such a statement is that society is all the more an instrument of improvement when we suffer a great deal in it. For our descendants to become improved in their turn, and for humanity to be raised indefinitely, it would be necessary to try to create for them many annoyances.

No one formulates this conclusion. In his most elementary, as well as in his most advanced institutions, man has always sought mental and physical rest. When these institutions have brought him suffering, uncertainty of the future, and great cerebral excitement, he has cared little for them. Submission to usage and authority has always been presented as being of a nature to demand the least personal initiative, a means of purchasing a little peace and security at the sacrifice of a little liberty.

It is equally true, however, that social life creates new difficulties for the individual. To manœuvre against a common enemy, gain possession of the booty, share, preserve and exchange it, and get the best of the bargain, to wish, according to circumstances, to bribe, frighten or deceive other men—these are everyday acts of the most barbarous peoples and are evidently rich in psychological development. They teach one to know one's neighbor, and consequently, oneself. They exercise the brain through observation, comparison, abstraction, and efforts of memory and calculation which are, at first,

very simple but become more and more complicated; and these faculties, developed for the needs of collective life, form the elements of the individual power of speculation.

These incessant open or hidden hostilities which result, for the individual, from life in common, have been excellent mental exercise for him. They explain how our psychology has become developed. But without the previous existence of a cerebral substance already of high quality and capable of becoming educated in several directions, the most complex social life would be of no avail, and, moreover, could not be produced. To bring pressure to bear upon an inferior being is not sufficient to make one of higher order. The difficulty to be overcome is salutary when it is proportioned to the strength of the one who must overcome it. Thus, to tell us that man found difficulties in his primitive institutions is not to inform us how he triumphed over them, for other animals put in his place would not have been able to do so.

(b) *Education by Coöperation, as a Fact of Individual Psychology.* It is true that if community life brings its vexations and struggles, it is, in other respects, an aid and a support. It furnishes models to be imitated by all. It brings individuals face to face with beings who resemble him very closely and yet are, at the same time, very different, and who have ideas, almost but not quite, like his own; and this establishment of the fact of unity in diversity, of differentiation in similitudes, as psychologists say, has helped him to understand himself in his relations with others, has been the germ of the most difficult conceptions regarding his own personality, the belief in and doubt of himself, which form part of the fabric of the most earthly, practical life, as well as of the loftiest metaphysical speculations. On the other hand, everyone has had a friend or a teacher who took an interest in the results of his labors and, accordingly, guided him, more or less carefully, in his undertaking.

(c) *Education by the Study of Social Products.* Finally, social products — or, more generally speaking, things made and invented by others as well as by ourselves — have acted upon and still act upon our individual faculties. These products may be material or moral, such as implements, monuments, works of art, institutions, etc. They do not throw us in contact with other human thoughts, but with objective verities of which the maker himself may have been ignorant. The workings of a machine may awaken in the lay mind ideas upon the general mechanism of the universe with which the mechanic, engineer or inventor were little enough concerned. Each of these persons is, in a certain measure, a pupil of the machine that instructs him and forms his logic but teaches very different things to each and establishes no bond of kinship between these various minds. Law-texts operate thus: the legislator, the bailiff, the commercial lawyer, the magistrate, the jurisconsult and the philosopher discover very different truths in a legal article. This social relationship is very specific and has little connection with those preceding. The products of human activity, detached from their original cause, arouse thoughts in us, and very different thoughts according to the state of mind of him who studies or makes use of them.

(d) *Society as the Educator of the Individual, its Benefit.* These three methods of the education of man by society (rivalry, mutual aid, and the study of human works) have the common characteristic of being phenomena of individual, and not of collective psychology. Faculties which, at the present time, are peculiarly individual, which we make serve our personal ends and can now apply and develop in a desert or a crowd, would not be what they are without this triple social influence. Society here presents itself as having been, for us, an indirect cause, an occasion of development. It was a goad

which awakened, excited, and kept on guard a preëxisting individual, cerebral force, and permitted it while working in its own interest to obtain, in addition, an individual, psychological benefit from this labor.

What benefit? It is very difficult to determine the importance of this benefit, but we may say that certain authors have exaggerated it considerably. The last and highest bidders in psychological socialism maintain that the individual is the debtor to society for the sum total of his faculties. Not that isolated man would have less or differently developed intelligence and feelings; but that he would not have them at all. He could, be it understood, neither form abstractions, nor generalize, nor classify; he would have neither will, nor memory, nor perception. He would be purely an instinctive being, intellectually an idiot. But a few simple observations will be sufficient to refute these exaggerations. Animals which form numerous groups are no more intelligent than those which live almost isolated. Among men, those who live in civilization, in social communities, are perhaps of a higher average grade of intelligence; there are, however, very stupid persons among those who take part in the most intense forms of public life, and very intelligent ones among savages. In any case, there exists no regular and proportional relation between the degree of sociability and of intelligence, such as there would be if one was the sole cause of the other.

When we follow up comparisons between social and mental functions, aside from these facts, what are they worth as reasoning? Mental functions would be fashioned in the likeness of those of the social world. Thus human consciousness would grow and improve just as human society increases and integrates. It absorbs new ideas from every direction; this is the first step. It unifies and classifies these ideas, and discloses their resemblances; this is the second step. Thus states are developed by concentrat-

ing numerous and heterogeneous groups; then, by disengaging and bringing into prominence ideas which are common to all, and eliminating any dissimilarities. These ingenious comparisons have only a verbal value and cannot establish the least bond of causality between ideas which are by nature foreign to one another. They are of no more interest than the bio-sociological comparisons concerning which there has been such an entire reversal of opinion.

Society has been one of the educative forces of the human intelligence; but not the only one. Contact with out-of-door things, animals, plants, earth, water, river, sea, sky, climate, seasons — all have played the same part. Hunting, fishing, stock-breeding, agriculture, and astronomy, are not as simple arts as people are pleased to call them. It is quite impossible to admit that the intellectual effort expended in their pursuit has vanished without leaving the least trace in our psychology, and that our brain is wholly fashioned by social labor alone.

It is none the less true that a psychological and also a legal history should deal with the development of the intellectual faculties of man under the triple influence of social struggle, social coöperation and social products.

3: MIXED PSYCHOLOGICAL PHENOMENA. We think and act under the almost continual influence of society. We are prevented by the law from deviating to too great an extent from a certain line of conduct. All penal law and a large part of civil law restricts our liberty, and the good citizen takes, once for all, a resolution not to violate the law even when it seems unreasonable to him.

Public Opinion. In modern times, public opinion is more tyrannical than the law. It controls and passes judgment on everything, — our morality, our beliefs, our æsthetic and scientific conceptions, and the details of our moral and material life. It approves, admires, blames and scorns, and its judgments are expressed by friendly

or hostile words and acts which are often more to be desired and feared than any legal sanction. Moreover, judicial decision is only too often inclined to allow public opinion to affect the law. Whatever the degree of civilization, and whether it is a question of the upper or of the lower classes, this opinion of the group is the constant preoccupation of the individual, who harmonizes his acts with the attitude in which he wished to be judged.

Formerly, this very commonplace truth was expressed in terms of individual psychology; the pursuit of the approbation of others, tendency to imitation, etc. Sociologic psychologists see in it only the social element, the pressure of the common consciousness upon the individual. Both of these interpretations are incomplete. Neither actively nor passively is the phenomenon, in reality, wholly collective or wholly individual. In the face of social pressure, men act and react according to temperament. Some submit to this pressure without coercion, conform in taste perfectly to prevailing opinion, and follow usage as if they themselves had originated it. There are others for whom existence is a perpetual conflict with the environment into which they were born, as well as with the country of their choice. In history, we meet with these malcontents who overthrow old groups and form new ones according to their own ideas, but are no more in accord with the second than they were with the first. We say of these men that they do not know what they want, because it would be too painful for them to follow the will of a group, and too painful to a group to follow their will.

Public opinion has its rebels. Among its adherents there are two categories. Those who, from a feeling of duty, obey it with respect and confidence, and those who regard it with scornful scepticism and disobey it secretly without scruple, but recognize and proclaim its power and its practical utility. And if certain ones flatter without

25th Nov 1944. The weather was very cold and the wind was very strong. The temperature was about 10 degrees below zero. The wind was from the north and was very strong. The sea was very rough and the waves were very high. The ice was very thick and the icebergs were very large. The icebergs were very dangerous and the ships were very careful. The ships were very slow and the ships were very quiet. The ships were very small and the ships were very old. The ships were very new and the ships were very big. The ships were very fast and the ships were very loud. The ships were very slow and the ships were very quiet. The ships were very small and the ships were very old. The ships were very new and the ships were very big. The ships were very fast and the ships were very loud.

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In order to wear it in some it is understood, to understand it, one must become acquainted with its existence. Now it exists, and the laws of social pressure cannot be explained actively or passively, without it. In some circumstances we have the sense that we are under the social pressure that is heavily enough, but has the advantage of being somewhat more than a mere pressure. We do not wear a crown? To say, public opinion, no doubt. If I do not wear one, the social pressure will make me of one. But also would I wear one? The social pressure? I do not know that one, represented a more than of one.

not less severe public? And would the urchins pay attention to me if they did not know that they were upheld by the general approval and if they were not proud of being its interpreters? We are strangers in life and thought, but are united by a net-work of collective psychology which, extending over a tremendous area, is everywhere the same; and through it these unknown persons of such youthful age and insignificant intellectual advancement, are judges whose jurisdiction I cannot deny. Collective thought operates actively through their mouths, and my passivity can be explained only by the recognition of this authority.

Every act of social pressure is exerted in the name of a precept which derives the extent of its force from the collectivity, even when this collectivity does not intervene directly.

4: PURELY COLLECTIVE PSYCHOLOGICAL PHENOMENA.

(1) *Collective Thought*. We may apply the term "phenomenon of pure collective psychology" to the case where the mental characteristics of each of the members of a group are absolutely different in nature and degree from the mental characteristics of the group itself. Some tens or hundreds of delegates before coming together are sincere in their intention to vote a certain way; having met together and discussed the question, they unanimously vote exactly the opposite way. This is a curious fact which will astonish the public at large and make it imagine more or less remarkable things.

The phenomenon is perhaps rarely presented in so decided a form. It occurs in very varying but, nevertheless, very perceptible degrees every time there is any reunion whatever. We shall fail entirely to understand the character, the intelligence, the good and bad qualities, in short, the complete psychology of each of its members, if we do not know why they have come together, under what form, and for what length of time; in short, if we

are not acquainted with the complete mechanism of the organization, it will be impossible for us to understand the attitude of each, and the different thoughts which will be expressed by the group. With five or six persons taken from similar or from very different environments, it is easy to compose various collective types of unlike psychology.

So clear an explanation has been given of this phenomenon, which has been well known for a long time, that it has been a mistake not to follow all its consequences. Every time that men meet directly, or communicate by writing, there is an exchange of ideas, new or commonplace, practical or visionary. Among these exchanged ideas, some are common to all, or appear to be so. The adherence of each individual to these ideas communicates to them a new force, and they return to the brain of each no longer with the timidity with which they might formerly have been affected, but with a quite peculiar intensity. What has been energetically affirmed and has not been contradicted appears incontestable. Psychology has assumed the collective form; ideas which are expressed and expressed the best, are in the mental foreground of everyone who can adhere to them more or less directly; while those that are passed over in silence or contradicted, remain in the penumbra; the whole has assumed an entirely peculiar shape which does not reproduce exactly the cerebral state of any one person.

There exists, therefore, a social consciousness. It is formed not, as is wrongly said, by the totality of the sentiments common to all, or nearly all, citizens, but by the totality of the sentiments approved by them. It is not enough that this conformity simply exists; it must be manifested, be recognized by all; individuals must have revealed themselves to one another, must have exchanged thoughts. Travelers unknown to one another seated in the same train compartment may be equally impatient

at an unaccustomed delay. As long as no one says anything, there is no collective thought. It will be born only when some one decides to break the silence and to express his indignation at the defective service. By uniting their indignation, their impatience and their ennui, these persons will produce a particular thought of a special intensity, which is not explained by the individual psychology of each. Whereas, the idea which everybody would have, but would believe himself alone in having, would be purely individual.

But we must go further; real conformity of opinion is not needed; apparent conformity is necessary and sufficient. The most powerful agents of collective belief are those who make it appear that they believe in it, not those who believe in it most sincerely. It is not even necessary for anybody to believe in it. By attributing it to the majority, each bestows upon it an artificial but powerful existence.

This last case is not rare, being rather the rule than the exception. It may spring from lack of sincerity, or from the adroitness of those who influence the masses and persuade each individual that the majority thinks as he does, — a process which is well understood by all candidates for elections, who energetically affirm their future success in order to win votes. At other times, there exists in the social group a tacit agreement to affirm a fact which each knows to be false or exaggerated. Even without the intervention of any deceit or hypocrisy, the supposed common thought very rarely coincides with the real general thought. When men are somewhat differently educated and of a different class and country, they possess but very imperfect means of making themselves understood. They may not, indeed, understand themselves. To them it would be in bad taste to insist too much upon stating precisely their opinions, their impressions and their observations; so that they are rather compelled to express

very different ideas according to the environment in which they happen to be.

Le sage crie selon les gens;
"Vive le roi!" "Vive la Ligue!"¹

He shouts thus, perhaps, through self-interest, policy or duplicity, but perhaps, also, through intellectual necessity, timidity or simple politeness. And accordingly, the world contains many wise men who agree upon vague, general, rather unimportant propositions which represent the thought of their surroundings, their collective thought. The discussion of these propositions is banned. They have, for the great mass, the value of dogmas, although each in his individual conscience may not admit them or consider them of any importance.

"Collective thought" arises from the bringing into contact of several minds, consequently it does not exist before this contact. The process of bringing minds into contact with one another creates and forms it. According as the same persons are together, at a hotel table, in a drawing-room or at some literary, political or religious assembly, according as they are brought face to face by chance or in the accomplishment of some duty, they express different axioms, uphold and cause to prevail perceptibly different ideas. Such psychology is truly social, for it arises every time there is society — the meeting of a few or of many human beings, coming together for pleasure, for business or to discuss political questions or professional interests. These psychological phenomena constitute very different types; the spirit of caste, class, profession, cloister, family, or social circle. Some may please us and others displease us, but each needs to be studied separately by comparing it with the social mechanism to which it corresponds.

¹ As shouts the crowd, so shouts the sage;
Long live the King! Long live the League!

(2) *Collective and Social Thought Confused in Certain Theories.* Precisely because these phenomena are social, they have no relation with what in the Durkheim school is called the collective or social consciousness, which is defined as "the totality of sentiments common to the members of the same human society," and upon which an attempt is made to base an absolutely fantastic system of natural rights. The "national juridical consciousness" of Savigny is an invention equally unreal. How can we know what the majority of Frenchmen think individually upon a question of morality, literature, law or religion? Are we going to ask them all one after another? This would be a tremendous undertaking, but even if it were accomplished, the result would still be open to suspicion. Some would not have understood what we were asking, others would have been incapable of replying, others still would not have said what they really thought; thieves would not have admitted that they considered theft a very excusable thing. If we succeeded in eliminating the mass of the incapable and the insincere, whose rôle in collective thought is very active, and reached the chosen few who reason and clearly state their ideas, we should then have as many opinions as individuals, and it would be impossible to disengage any prevailing opinion. A moral or legislative principle can triumph only by the adherence of many who would not be capable of formulating it and who do not even understand it entirely. One philosopher has never been known to say exactly the same thing as another philosopher, nor one sociologist as another sociologist, nor one political theorist as another political theorist.

The whole of the individual psychology, the sum total of personal ideas, the complete activity of human thought, is destined to remain forever unknown. Perhaps we know only a very trifling part of what the small, the average, and the great minds have produced. A great deal of

intellectual labor which might have merited preservation has disappeared. But such preservation is not materially possible. The privileged few can express what they think, can make their speech or their writings understood, and transmit them to succeeding generations, but the majority of philosophical and juridical works and even those of practical interest go unread or soon sink into oblivion.

What is thought in the group, in the nation, or in humanity, does not constitute social thought. The whole intellectual labor of human beings does not become synthesized, nor does it create law, religion or any social phenomenon. It is a real thing which cannot be perceived, a sacred thing which we cannot respect since we cannot know it. On the contrary, collective thought (that of groups) is easy to observe; it is a convenient object of study, thanks to its relative meagreness. In fact, it governs the world; but nothing can give it the right to do so or compel us to accord it our respect and esteem. It is a concubine which cannot be driven from the conjugal abode.

The Durkheim school supposes that the social consciousness is formed by mysterious processes in a political group or in some definite region, whenever assemblies, crowds or writings give it the opportunity to reveal itself. I maintain, on the other hand, that every event, every institution which brings many brains into contact, itself transforms scattered and uncertain fragments of individual psychology into collective psychology, so that before the communication of ideas has been materially effected there exists nothing specifically collective. What will be the general spirit of a particular assembly? That will depend upon its powers, upon the task it has to accomplish, upon the way in which the president and the board will be nominated, upon the duration of its powers and upon the one who will first address the house. It becomes a collective being by contact; and before the

first contact, it does not exist. When individuals come together, even in small numbers, it is practically impossible for them to extricate their common thoughts; they can only create a special psychological being which will fulfil more or less successfully its function of reconciling different ideals.

(3) *Correction of Durkheim's Theory of the Function of Punishment.* Durkheim's fine theory of the present and the historical functions of punishment should therefore, in my opinion, undergo a slight correction. For him, crime is an injury to a preëxisting social conscience; it is a contradiction of general beliefs, and the group rebels against it. The guilty party is punished in order to affirm that the act committed is forever abhorrent in the eyes of the whole group, and to maintain the cohesion of the moral ideal. Without the sentence and the punishment of the criminal, no citizen would know whether the violation of usages and rules of conduct meets with the same disapproval among other citizens as it does in his own conscience. These statements are strikingly true.

But one ought, it seems to me, to go further. The public sentence and the public punishment of the guilty one (the pronouncement of the penalty and its application) are not confined to *maintaining* the social conscience; they create it, modify it, and add or retract something from it at each session of court. Public disapproval has followed, not preceded, the application of the punishment; for if such disapproval had been and was being produced through itself or in virtue of other causes, it might "a fortiori" maintain itself without the coöperation of public punishment. It would be easy to show that, especially among primitive peoples, but also even according to our modern conceptions, the punishment is more degrading than the crime. Even if a person be unquestionably guilty of a crime, yet if he escapes the penalty, he escapes dishonor more or less, because the collective

act of punishment has not been declared with respect to him. Even today, to have been in prison for robbery; to have been prosecuted for robbery, and condemned in absence, but to have escaped in time, disguised as a stranger, and to be proscribed; or finally, to have been convicted of robbery but to have died before the sentence, — these constitute socially very different degrees of disgrace. These are for us no more than survivals of ideas which appear in the old laws with striking distinctness.

If we try to imagine the first act of social repression, the first time that a group might have exercised penal justice, before the first contact of individual brains, there would have existed nothing collective in their minds. This first popular tribunal would be essentially irresolute, open to every fluctuation of sentiment, and might equally as well acquit the criminal as tear him to pieces, by the least chance incident. After this first decision, this first creation of collective psychology, the memory of this former phenomenon would remain in the minds of the people and consequently there would be a tendency to repeat it. This tendency is originally of small moment, but it would necessarily assume more stability through repetition. Not being absolutely ignorant of what they thought in common formerly, if no obstacle presents itself, the citizens will reproduce the same thoughts for the same situations. Collective psychology establishes itself in tradition and in judicial decision. With the development of civilization, men recognize other means of communicating their thought than that of meeting and talking; they send messengers, preachers, bards, and written or printed matter, where a single man acts the part of spokesman for an indeterminate portion of humanity whose opinion he represents. From that time, collective thought appears under two very different types: (a) crowds, where men in greater or less

numbers come together, all concerned with the same object and communicating their impressions to one another directly; (b) opinion or tradition, which is more vague, more tenacious, composed of a considerable accumulation of old impressions and exercising its influence on every subject. By its origin, it is connected with the psychology of crowds but no longer resembles it.

(4) *Collective and Individual Thought Differentiated.* What is the nature of collective thought? In what does it differ from individual thought? It does not seem to me that this difference is in its content. There does not appear to be a way of loving, of hating, of becoming pacified or of flying into a passion, which is peculiar to collective bodies. Societies have the sentiments of even the most complex men; they are notably vain. It has been affirmed and supported with examples, that they have a "mania for the grand." This assertion appears warrantable in some instances. They are also accused of harshness, wickedness, selfishness and cruelty, but there is nothing very definite to justify these accusations.

The crowd, it is said, has more feeling than logic; this is not quite accurate. The crowd reasons as an individual reasons; it makes inductions, deductions, and generalizations. Great orators specialize in controlling collective thought. Demosthenes and Cicero are remarkable in this respect. In their works we see the force and flexibility of argumentation which is necessary to draw the masses. The latter are not so credulous as we wish to think them. Appeal may be made to their powers of reflection as well as to their feelings. Nevertheless, social logic can dispense with accuracy where individual logic could not. The isolated man to whom a course of reasoning is submitted remains in doubt if he does not find the reasoning itself the means of justifying his belief. But if he becomes part of a crowd, he is less particular; although he may not understand a thing very well,

if everybody else has the air of understanding it, he is easily convinced. He relies upon the intelligence of others. It may thus happen that nobody in the crowd fully understands a certain question, but as everyone supposes his neighbor possesses more perspicacity than himself, the approval is unanimous. In the same way a collectivity may likewise use less precise terms; in our modern societies abstractions and stereotyped phrases are greatly esteemed. In former times, proverbs were very popular, and in much more primitive civilizations, words could be substantives, adjectives, or verbs without regard to grammatical accuracy, that is, words possessed no objective precision but simply condensed a certain number of impressions experienced in common under certain circumstances.

These peculiarities of collective logic are very important; it is very probable that when we encounter them, the ideas they represent have had their origin in groups and are not due to personal initiative. Thus it was possible to determine the social character of belief in magic by the fact that the theories upon which it might have been based did not completely justify its contents, and also, that the terms used were very broad as well as very uncertain in their meaning. Thus, perhaps, Germanic law might be characterized by opposition to Roman law. The latter is individual not only in the essence of its provisions but in that it has been framed by the most powerful individual logic. Its outlines are clear and precise, and the terms easily definable. The former is a collective work, vague in outline and abounding in indefinable terms ("gesammte Hand," "Gewere," etc.), the meanings of which have never been clearly grasped by anyone, no matter how frequently they have been applied in practice.

But if this psychology is somewhat different from ours, we can understand relatively why it is different, and the

personal impressions of our everyday life can furnish abundant data. Of course in any particular parliamentary assembly all of the members do not experience the same impressions. The timid are ignorant of the psychology of the leaders and vice versa. Everyone in the course of his life has been more or less both; and if we are unable to reestablish the psychology of the whole of a collective phenomenon, it is, on the other hand, very possible to discover by subjective analysis and by the combination of the personal impressions of others, the general texture of collective psychology.

This is all the more so since subjective study alone can instruct us as to the nature of the phenomenon. Until we do so, we substitute words for realities. The social fact does not explain social psychology any more than the nerve explains sensation, or the study of the brain, intelligence. Besides, subjective observation can be as certain, as much under control, and as impersonal as objective observation. We shall examine thoroughly and methodically the prevailing prejudices in this matter. It will suffice to point out here as the subjective and impersonal source of collective psychology, the art of oratory as a whole, and the greater part of rhetoric. Is it not reasonable to go to those who have made it their business to control the masses and excite in them thoughts at their convenience, and ask for information upon the nature of these collective beings whom they have been obliged perforce to study so unremittingly?

§ 3. *Social Beings and Collective Thought.* No science is as much puzzled as psychology to define precisely what beings are the objects of its study. Is this eulogizing it or casting a slur upon it? The more completely it frees itself from the concrete and commonplace, in order to penetrate the abstract or complex, the more difficult it is to point out in everyday language what its object is, for since that object is not an ordinary thing, an effort of

the intelligence is required to determine it. Sociology has assumed the task of establishing, by the aid of observations which anybody can make, facts which are ordinarily not grasped by common sense. Thus it has been possible from all time to show that men in groups do not think as do men separated; but of what great importance this phenomenon is in all branches of history has not been realized. And so perhaps sociology will point out to us what are the collective beings that are capable of thinking collectively?

1: *The Nation as a Conscious Organ of Collective Thought.* Let us say immediately that this is a very great mistake, for no sociological school will teach us anything upon this matter. For the majority of sociologists, the social being par excellence is the nation. We are told that laws, customs and traditions are the expression of the thought of a nation. Such is the gross error, the misconception, the untenable assertion, wherein systems, otherwise very ingenious, swerve from the path of logic. For a collective thought can only be formed when all the brains are brought into contact with one another. Who would dare to maintain that all the people of a nation know one another and act in common? The French nation is given as a type of society because it is very much centralized and unified; what ideas, however, are there in common between the different classes, what convictions between the various political parties, what interests between the several portions of its territory? There exists, no doubt, a certain reciprocal sympathy between the various citizens, a certain pride in belonging to a strongly organized group. The nation is the object of different individual sentiments which vary in character and intensity according to the individual and the region; it is not the director of our thoughts. Our nation does not compel us to love it; we love it of ourselves, perhaps also through a more restricted collective influence, because we are taught

to love it, and the people around us communicate their patriotism to us.

2: VARIETIES OF COLLECTIVE BEINGS IN SOCIAL ORGANISMS. The nation is not a thinking collective being. Can this character be attributed to more limited political associations, — tribes, cities, families, professional bodies, etc.? This would almost never be entirely correct. Political organisms are not in exact juxtaposition with the psychological beings which result from them; for collective thought derives its peculiar character from the authority which the thoughts that we attribute to others have for us. It is formed by the exchange of ideas and can only be produced in the minds which take part in this exchange. The being in collective thought is formed by the totality of the individuals who are in effective communication.

This communication may take place directly between persons who come together, talk, argue and are able to exchange their impressions as fast as they are produced. (a) Crowds, assemblies, clubs and meetings, summoned or formed accidentally, are the first type of being in collective thought. They are emotional, changeable and easily excited or depressed. The impression of the moment is often too strong for past impressions not to be effaced by it. These beings are delimitable and measurable. It is easy to calculate the components of this first type and the functions of each individual in relation to the mass phenomenon. But these ideas are transmitted also between persons who do not know and never meet one another, by means of oral or written tradition and usage. (b) Opinion is a second type of the thinking collective being. We take this word in the restricted meaning of "collective belief to the exclusion of every personal belief." We know that a great number of persons respect certain traditions and certain usages; we conform to them and blame those who violate them. We thus form a part of opinion; but with whom? With persons whom we do

not know, who live neither in the same house, town or country, whom it would be impossible to enumerate and who cannot constitute — except among very primitive peoples — anything which resembles a political unity. There are "Opinions" of every kind, moral, religious, literary and artistic, of fashion and of prosperity. These collective beings are more stable than crowds, but more vague, more amorphous, and more difficult to appraise.

Thus in every social organism of civilized peoples, and perhaps even among primitive peoples, there exists a great variety of social-psychological beings, or if it is preferred, of collective thought. In a city of the Middle Ages, we see regular assemblies of the people, senates, more limited councils, private cabals of chiefs who plan revolts or "*coups d'état*," riots, and unions of merchants, of business men and of people who seek amusement. There will be quite as many different "crowds" who will do very different things, and no one of them will be confused with the city as a whole. The second type, "Opinion," is not less well represented there. The patrician obeys patrician traditions and customs, the plebeian, plebeian traditions and customs. The merchant does not praise and blame the same acts as does the soldier, the scholar or the man of the lower classes; nor does he live, work or seek amusement in the same way. He finds ideas peculiar to this sphere in many other towns, — and is anxious to be esteemed wherever he goes as well as in his own country.

Where then is the "social consciousness" of the city? It is nowhere. We find in it an infinity of small "collective consciousnesses"; and one may ordain what the other prohibits. An individual caught in a crowd may be drawn into taking part in the lynching of a criminal, and the next day find himself condemned by public opinion for having done it. The most primitive peoples, like ourselves, obey different collective forces according as

they were grouped in more or less dense crowds, united in families, or isolated. Likewise, we often see persons break with their traditions in a moment of revolt, but soon regret it and return to their old habits. They sometimes follow the direction of the crowd, sometimes that of opinion.

Political organisms bring about assemblies of individuals and currents of opinion. They give collective thought the opportunity to develop. The phenomenon should be studied in the exchange of ideas and the material processes which have governed this exchange.

§ 4. *The Past and the Future of Individual and Collective Thought.* Moral and physical labor, institutions, laws, literature, philosophy, religion, works of art, material construction, — all reveal human thought to us, but what kind of thought? Are we indebted for this thought to individual genius, to currents of opinion, or to the influence of community life? This is evidently an important problem in history. We shall regard antiquity in entirely different lights according as we consider the knowledge of the beautiful, the predominating influence among the Greek people as a whole, or as we attribute it to only a few great architects and sculptors. This is a question which the historian cannot and, in fact, does not evade. According to his temperament or his governing ideas, he fashions history from an individual or from a social standpoint, without pointing out, or doing so very briefly, the reasons of his method.

1: PROPORTION OF INDIVIDUAL AND COLLECTIVE THOUGHT. The process just mentioned is clearly an arbitrary one. It is almost entirely so when an attempt is made to establish once for all the rôle of personal initiative and of the influence of environment, by a few examples taken at random from the present and the past. Yet we try to qualify, "a priori," every branch of human activity. We say that morality, religion, law, etc., are

creations of the social mind, and the exact sciences, individual creations. This process is equally dangerous, for there is scarcely a science, even an objective one, which is not influenced by opinion to institute research in a certain direction rather than in some other, and personal effort is always necessary to produce works which are even the most completely in harmony with public ideas; as for instance, a serial novel, a declaration of political faith to one's electors, a ministerial program, or a political address. According to the age, a work of the same nature will be more social or more individual. In other words, the collective mind does not seem to have acted the same in all civilizations, and in the one in which we live, it is easy to distinguish liberal and autocratic periods, also forms of social pressure which disappear and others which arise. Grammarians are less irritating than formerly, experts in hygiene more so; or, to be more exact, the society which taxed the patience of the preceding generation with more or less justifiable rules of orthography has become more reasonable in this respect; but it never was so trivially annoying with respect to eating, drinking, sleeping, heating and lighting.

Thus we shall have to recognize that collective thought varies with the time and that it should be studied in action, dynamically, according to the expression of current terminology. But the dynamists (those who study beings in their movements and whom we may term more simply historians) are still divided upon a question of method. Some believe in the possibility of making a sketch of the relationship between human thought and society, of pointing out the main lines of the evolution of one in relation to the other, either through a continual emancipation of the individual or by a more and more distinctly marked tendency to solidarity.

2: THEORIES OF THE REGULAR AND STEADY DEVELOPMENT OF INDIVIDUAL THOUGHT WITH ADVANCING CIV-

ILIZATION. According to certain theories, history would show us how the purely social being which composed primitive civilizations has acquired by degrees a personal intelligence, an originality of ideas which permits him to be distinguished from those who are called his likes but are so no longer at the present time in the strictly literal meaning of the word.

(A) *First Theory: Decreasing resemblance between individuals with advancing civilization; Primitive law solely penal.* Let us state and examine one of the most widespread of these theories. According to it, man has acquired, in the course of history, the power of thinking entirely alone, of reasoning objectively, of being different from his neighbor, and he has always developed in this direction because the social organization likewise has followed a unity of direction. Primitive groups are essentially simple and homogeneous; civilized ones, more and more complex and heterogeneous. Among savage peoples or those approaching the barbarian stage, individuals resemble one another in physique and in mentality. Naturally — physiologically, we may say — they ought to think the same thing, have the same habits, the same ways of living, the same methods of work. All those who live together resemble one another, and like to live together because they do resemble one another. Law is then the obligation not to disturb this harmony, and for that reason, to do as others do upon every occasion. Whoever wishes to escape from the general uniformity, arouses the consciousness of the group which reacts with violence and strikes the culprit. Every primitive law is solely penal, and every penal law is, in its origin, the repression of injuries to the social consciousness; and this is why it sometimes punishes infringements of certain rites that are very inoffensive crimes to everybody, and again ignores crimes that are extremely dangerous to individuals.

Within each group, the individuals are all much alike; but each of these small societies may differ from its neighbors. Events of a varied nature have compelled these first social beings to inhabit the same territory, then to become merged politically, juridically and physiologically. In this second degree of civilization, fellow citizens no longer resemble one another so completely; traditions and customs are no longer so energetically affirmed by the collective body. The old solidarity has diminished and the larger, denser and more heterogeneous the group becomes, the less vigorous the old social influence. Now civilization nearly always tends towards the formation of more and more populous organisms; it brings into business or family relations, people who are very unlike, and creates complicated economic and administrative machinery wherein labor becomes more and more divided. Pursuing different occupations, deriving different ideas and traditions from their origin and physiology, fellow citizens no longer have so limited a social consciousness and individual thought is liberated. Thus the development of civilization tends, in a certain sense, to the emancipation of the individual and the destruction of the social bond.

But men do not seek one another only because they are alike; they seek one another still more when they are unlike, if, thanks to these dissimilarities, they are complements of one another, if the useful or desired object cannot be accomplished by one person alone, or if it is the product of two specialists. Such is the case as soon as division of labor appears in the various economic, industrial, political and intellectual domains. Men are then connected by a premeditated organic solidarity, where, although more intellectually isolated, they are, nevertheless, more and more dependent upon the social body, for they are not sufficient unto themselves and can only perform just that function to which they are adapted. Fellow citizens are united by an underlying social bond.

Correction of the Above Theory: This very fine thesis of Durkheim is worthy of acceptance in its large outlines. For the historian of the law, it is evidently only a "schema" which cannot exempt him from a check or control nor render him less attentive in the observation of facts. But it is valuable, for it is of a nature to make certain juridical facts of the past understood with a greater degree of philosophic insight. Nevertheless, we cannot accept it even to this extent without modifying it somewhat.

The fact that in primitive groups individuals resemble one another psychologically and physically seems a correct observation. But since, by virtue of their identity of physical conformation, they possessed the same tendencies and the same good and bad qualities, and since they were impelled by inclination, by their own nature, to obey the social consciousness, it seems that crime, injury to that consciousness, ought to have been unknown or nearly so. There was no reason for the development of a completely useless penal law.

Crime, or according to the definition which has been given it, injury to the social consciousness, presupposes a certain originality of mind on the part of the criminal, who is therefore a psychological individual. Now, we are informed that this is only born later by the division of labor, when the penal law, the sole pivot of primitive society, begins to lose its social importance. There is here an evident contradiction. In order for the penal law to have been able to develop, there was necessary at least a germ of individual thought, which is opposed to the common mind and causes it to react. Accordingly, the two psychological modes must have always coexisted whatever may have been their respective importance in the different periods of history.

In fact, let us suppose a clan where all men are absolutely identical; that does not prove that we may dis-

cover in their collective thought the intellectual and moral elements which are proper to each. Still less does it signify that every individual always works in the general interest and discloses to the whole group the sum total of his thought and action. It is always possible that in assemblies certain mental tendencies are exaggerated by the communication and others remain concealed. Thus there are formed currents of opinions which may be termed "social consciousness," that are more or less different from the real tendencies which individuals obey when acting in their own interests. Thus is explained the formation of principles which are openly and traditionally affirmed by all. Thus is explained the fact that in spite of general adherence to the same principles, we all bear in us the germ of sin, of disobedience to the system of morality which we have helped to create and which is a small part of our nature, but which never completely satisfies the aspirations of the most submissive or the most perfect man.

Individual tendencies are manifested, moreover, among the most primitive peoples in one of the most important elements of penal law, namely, the taking of the law into one's own hands, or private vengeance. Crime is not then an injury to the "common consciousness" but to individual interests; punishment no longer has as its social function to maintain the general disapproval, but to give satisfaction, to appease, to calm the victim or his relatives. The mistake was formerly made of supposing that all penal law was derived from this source alone, of considering, for example, that the treatment of sacrilege was always a regulation of divine vengeance. It is very certain that crime often derives its specific character from the fact that it contradicts the prevailing opinion; a great many political and religious crimes are instances of this. But the Durkheim school does not labor under a less serious misapprehension in trying to trace private vengeance

back to a process of collective reaction, under the pretext that the group sometimes intervenes in order to protect or regulate such vengeance.

In reality, even the oldest penal law is not homogeneous. No one can understand its history and development who does not take into account at the same time (a) the individual sentiment of vengeance, (b) the collective sentiment of reaction against injuries to common beliefs, and, later, (c) the political idea with respect to civil and religious authority. From these three elements the most varied combinations have been formed. There are civilizations in which political crime plays a preponderant part, others where its importance is only secondary, and others, still, where it does not exist at all. There are peoples among whom the collective consciousness is not powerful enough to convert into a misdemeanor any disregard of custom and belief. With them, private vengeance, more or less regulated, operates solely to maintain public order. Such is the case in the pre-Islamitic Arab law. It is well, in regard to this point, to read the inquiry upon the origin of the penal law made, through the initiative of Mommsen, by a dozen of the most authoritative specialists. From this, one will certainly gain the impression that the exclusive theory of the ancients would be more easily adapted to facts than Durkheim's exclusive theory.

But it would be a mistake to accept either. The independence of each of the ideas which has directed the destinies of the penal law must be carefully preserved. These ideas (without which the penal process cannot be understood) are, as has been indicated, (a) the anger of the victim, (b) popular indignation, and (c) the will of the authority which interposes its intervention. Let us take a rather ordinary juridical type where the three psychological penal forces are combined without being confused. A crime has been committed; a man has been killed. The nearest relatives are going to take the initiative in the

prosecution. If they make no claim, the collective body will not act in their place, a proof that the deed in itself is a matter of indifference to the collectivity and has not excited its indignation. Nevertheless, opinion is not entirely without an influence in starting the movement for prosecution. Anyone who would permit the murderer of a relative to go unpunished would be disgraced and his cowardice might cause him juridical difficulties. But if this is so, the lack of personal courage and initiative at such a time is blamed even by the collectivity which likes to be forced into action, and sometimes even treated with violence. It has not changed much since olden times.

The family of the victim proceeds to prosecute the murderer. At a more primitive epoch, they would have killed him without formality and the feud between the two families would have continued indefinitely. But we are already in a more civilized period. The prosecutors will act with the concurrence of the public powers and of the collective force; thus they will be more certain of victory and, having inflicted the punishment, they will be protected against the anger of the other family. And above all, if they acted without asking the aid of the people, their opponents might be more skilful than they, and complain after the revenge that they had been attacked first, thus gaining the public sympathy; accordingly the innocent would run a great risk of paying the penalty instead of the guilty. It is, therefore, the moment to awaken popular indignation, to let loose the collective hue and cry. The injured family will effect this by the only possible processes employed from all time to excite crowds, namely, by cries, tears, violent and skilfully-enacted dramatic scenes, and especially by a relentless accusation which derives its value not from rational proof and complicated deductions, but from the vigor with which it is affirmed. And if the family of the victim succeeds in interesting collective thought in its affair the accused has

no longer against him one or more individuals, but a veritable mob convinced of his guilt and ready for a lynching. To escape such fury, it is not enough to deny the charge, or plead excuses; more energetic means are necessary. Anyone who would confine himself to a purely passive and defensive rôle would run a great risk of losing his life before he had explained his case. He must take an active part, cry out against slander and invoke gods and men with more or less tragic gestures. He must prove his innocence. The proof devolves upon the accused, the defendant. This proof will be dramatic, naïve, and of a nature to impress the crowd. Sometimes the defendant will invent it himself, sometimes the religious or civil authorities will indicate by what means the innocent can be distinguished from the guilty, and to what tests the accused must be submitted.

This drama, which constitutes the primitive criminal process, can only be conceived as a struggle between two subtle, active and crafty personal intelligences endeavoring to launch against one another the half-blind, half-unconscious force of popular indignation.

Thus the individual mind existed at every epoch in conflict or in combination with the collective mind. Otherwise, the penal law, which has been rightly chosen as a type of social constraint, would be inexplicable. Division of labor has been, no doubt, of great psychological importance, but it has not created the individual nor destroyed the passion of crowds and of opinion. There has been no substitution of a new type of thought for the old one, but the coexistence through ages of two intellectual forces which have acted differently according to the period, and the historical relations of which cannot be comprised in a formula.

(B) *Second Theory: Gradual transformation of purposiveness with advancing civilization. Resolutions caused by individual intellectual progress. A general sketch*

of the transformation of the collective mind by civilization has been drawn from a somewhat different point of view and is worth our attention. According to this thesis, primitive man is a creature of instinct and primitive society, an instinctive institution. Originally, man, like the ant, the bee or the beaver, is ready to sacrifice himself and others without reflection or intelligence, to society and the destiny of the species. He does not ask himself what purpose may be served by the general prosperity other than to render each individual stronger and happier. But man becomes transformed by degrees from an instinctive into an intelligent being. He reasons about the object of his actions, his laws and his customs. Society is no longer the end in which the individual should become absorbed, but its "raison d'être" is in the happiness which it ought to diffuse, and the unhappiness which it ought to prevent; and since the physical human being is the only one who can be happy or suffer, he becomes the rational aim of civilized organizations. Social or individual psychology becomes transformed in its purposiveness. Thus collective forms with individual aims should replace collective forms with aims which are unconsciously social. Modern states wrest the individual from the tyranny of blinder and more oppressive groups. Based upon an intelligent altruism, they allow the most diverse liberties to balance one another. Likewise it is not necessary for the State to be set in opposition to individuals. The powers of the State are the guaranties of our personal development.

Civilized states are established by a series of revolutions. Every revolution is an insurrection against thoughtlessly accepted tradition, and its object is a transfer of authority, the substitution of a premeditated social bond for that of instinct and tradition. The cause of these revolutions is to be found in the intellectual progress of the individual, in the continually increasing complexity of

his conceptions. Progress is always effected therefore in the direction of more complete personal effort.

Criticism of this View: This theory presents a certain appearance of truth. Every epoch has its authoritarian traditionalists, who do not admit any discussion of their principles, and its innovators, who criticize, argue, and propose systems which are sometimes very ingenious. The former represent the past; the latter, the future. Unfortunately, what complicates matters is that the innovators are not always men of remarkable intelligence, nor the traditionalists, men of pure instinct. The latter reason about their lack of reasoning. "The reason of man is too feeble to be permitted to make faulty and capricious innovations." "Our fathers knew what they were doing. Let us abide by their experience." These are men whose minds work inductively; though not always very well informed, they are particularly fond of the experimental method. Modern science without approving their conclusion cannot condemn their process. The reformers nearly always have a logic which is more ingenious than critical. Their familiar method is deduction. They seldom investigate whether reality approves or refutes their statements. In former times they were purely deductive reasoners and dangerous ones at that. Nowadays, they place somewhat more value upon observation but dialectics remains the chosen weapon even of those who do not acknowledge it. Moreover, it may be asked whether it is really possible, whether it will ever be possible, to base a reform solely upon observations and inductions.

So much for creative reformers. As for their disciples, they are content to repeat a course of argument which they do not always understand and which is often reproduced by them so defectively that the least exercise of the critical faculty would disclose its gaps. Every revolution springs from an argument, from the need of

reasoning, but not from any progress in the art of reflection. Civilization does not necessarily move towards a more effective participation of the individual intelligence in social organization, and toward a diminution of the spirit of contagion and suggestion. There is, in this respect, no straight line in history, but a series of phenomena which must be appraised separately.

Moreover, while we admit that a revolution always expresses an intellectual gain, it is the intellectual gain of one or more of the rebels, not of the whole nation. If in a band which passively obeys a chieftain, a few revolt and take a personal initiative, the rebellious ones acquire by the act of rebellion a higher intellectual status; but the band as a whole will be governed perhaps, with less intelligence than before, and an act of reflection will in practice be equivalent to a piece of veritable stupidity.

Finally, if social relations have, in civilized countries, passed from instinct to reflection, it is very astonishing that after so great a number of revolutions we are still so little advanced, and having reflected so much, we are still so instinctive. When serfs and villeins, who have always obeyed their masters by instinct, have become capable of emancipating themselves, have they not reflected deeply upon the injustice of their exploitation and the more or less complete equality of men? Have they not decided to break with their traditions completely in order to establish a society based upon rational principles? How has the intelligent city, the agent of freedom, become the instinctive and tyrannical city which the governments — according to those whom we are criticizing — were right in destroying in order to permit the individual to find himself again? How does it happen that, after centuries of life in commonwealths, after a series of revolutions each of which ought to represent to us a destruction of instinctive tradition and an awakening of reason, tradition has not been dead for ages and reason awakened long ago?

Certainly the one must be very tenacious of life and the other sunk in a most profound sleep.

3: COEXISTENCE OF INDIVIDUAL AND COLLECTIVE THOUGHT. But one explanation can be given. The tradition of instinct, otherwise called Opinion, is a form of thinking which exists now as it has always existed. When conscious and individual reason attacks a collective tradition and destroys it, its course of argument and its affirmations are, by penetrating into the masses, transformed into unconscious, unreflecting Opinion which only a new personal effort can, in its turn, destroy in order to substitute for it a new collective thought of the same nature as that which preceded it. We must not, therefore, arrange in series the phenomena which are coexistent in history. The collective mind under diverse forms is discovered to be today almost what it was in earlier times. It is not necessary to see in history a succession of psychological forms which are more and more collective or more and more individual, but a series of the most diverse combinations of intellectual elements that are almost identical in every age.

There exist, no doubt, at every instant multiple forces which tend to diminish the pressure exercised by society upon the brain; but there are others which have the opposite tendency. One must know how to detect both if he wishes to avoid making a poor history or rash predictions. Thus, if certain tendencies of the present are taken into account, we might admit with M. Draghicesco that we are moving toward a complete unification of humanity. Peoples penetrate each other more and more, international barriers will perhaps fall in a longer or shorter time, distance becomes easier to encompass from day to day, classes are becoming equalized as are fortunes, manners and education. The psychological consequence of this is that individuality is disappearing, or rather that after having absorbed all individual effort, collective

thought will be common to all, in such a way that the subjective, the objective and the social points of view will become confused. The truth will be accessible by direct methods. Men being all equally wise and clear-sighted, the best process to discover a scientific law will be to make an appeal to a universal vote, which will necessarily contain the greater part of objective truth since it will be the expression of a greater number of observations. Thus universal suffrage will create genius by pointing out the individual in whom it wishes such genius to become incarnated; it will assign to each his rôle and his value with all the greater ease, since each will be, in this respect, the equal of his neighbor.

Is humanity really destined to a future so fantastically monotonous? There are good reasons to hope not. However, if this future appears to us fantastic, it is not so; if we consider that certain social forces are at work, and if we suppose that they alone will sweep the world along, the ideal of M. Draghicesco ought logically to be realized. That is all the more certain since it is already almost realized. For the Utopia of social integration, like all Utopias, is not a work of the imagination but the generalization and the exaggeration of certain states of the existing society. Worldly and cosmopolitan aristocracies do in themselves what the socialists would like to see done for humanity. They transform into collective thought their judgment upon men and things. Moral, scientific or æsthetic principles are not considered as capable of having any intrinsic value; they are accepted or not accepted. Men of genius and talent are chosen and personal worth distributed, not by ballot, but by currents of impersonal and unreflected opinion.

But this class is submitted to the most energetic socializing forces. Even down to the smallest details of his life, the individual is in perpetual contact with Opinion and with an essentially wide-spread Opinion. This class

dwells on the fast liners and the Orient-Express, in an environment always changing. Now, people who know each other but slightly can only treat one another as equals. Psychological socialism and the principles of human fungibility ought to find a favorable soil in such a company.

But aside from these socializing forces of the modern age, there are very vigorous forces which tend to isolate individuals and which scarcely any political organization seems able to influence. Science becomes more and more objective and less human, that is to say, less social. The time is not far past when scholars argued the most abstract questions through letters, took long journeys to meet one another and made extended sojourns together to discuss ideas. We no longer simply pore over books; we seek instruction from them, sometimes arguments. But the name of the author is of no moment to us. We cite it through literary probity, but rather as indication along with the date of the publication and the name of the editor. The most objective work, that which escapes most completely every influence of environment, is the one we esteem most highly.

On the other hand, the practical life of modern times permits man to break every psychological bond with society. We can benefit by all the advantages of civilization and procure for ourselves all the resources of intellectual and material life by automatic processes. Business life is equally objective. Formerly no one bought anything without lengthy overtures and much discussion. Today, we look up the market price, sign an order and all is finished.

Likewise we must not count upon education to socialize thought. If, however, we suppose every individual to have his full share, and that in spite of the differences in the mediums of instruction, there might be an ultimate attainment of this fine result of rendering all men equal, everyone would then always be able to do without his

neighbor — would be self-sufficient and free from any need of the coöperation of the crowd.

§ 5. *The Law and Collective Psychology.* Law is a social affair, in that society is a condition of its existence; its only "raison d'être" is in enabling certain men to dwell in peace and harmony, and in removing the difficulties created by community life or even by that of a simple neighborhood. But is it a social product, an invention of collective thought? That is another question. The majority of industrial inventions are designed for the use of the public at large and are social in purpose, but they result from ingenious and complicated calculations which one or more scientists have pursued by retiring within themselves, by isolating themselves from the crowd for days and nights. Social "raison d'être," social interest, and social origin are very different points of view, one of which does not necessarily entail the others. These different ideas are not always clearly distinguished. We should like to try and point out to what extent the making of the law is, and has been, a phenomenon of collective or of individual psychology. Only the broad outlines of the question will be traced in the following pages. Important works — whose logical conclusions we accept only partially — have furnished a large part of the necessary information.

1: **ROOTS OF LAW IN RELIGION AND MAGIC.** The Law, the institutions and the legal customs of primitive peoples, or those whom we consider as such, are very closely connected with religion. The king is a descendant of a national divinity; the judge and the lawmaker transmit to the people the will of the gods which becomes transformed into law, and these laws sanction religious obligations which are at the same time ritualistic and moral. We do not believe any law to be exclusively of religious origin; but it is none the less certain that the influence of religion is considerable.

(1) *Religious and secular — collective and individual — elements in origin of law.*

Is religion as a whole a phenomenon of collective psychology? It is not in our province to decide this question. It is certain, however, that every religion implies the existence of a collective belief in the mysterious, supernatural, and sacred character of certain things. The notion "sacred" is perhaps in itself a product of collective psychology; in any case, it assumed at a very early date, the collective form of an opinion which derives a part of its force from its solemn public affirmation under certain circumstances.

Every juridical provision was therefore a sacred thing and its violation a sacrilege, that is to say, not only an offence to a supernatural being, but to the strongest sentiment experienced in common by the individuals of a group, to the opinion which is most widespread and in regard to which no contradiction is tolerated.

But even when the law appears in its most unquestionably religious character, it is far from being certain that the provisions themselves are not of different origin. The rôle of the individual legislator who reflects upon the political, practical and hygienic reasons of laws, is not excluded by the fact that obedience to his work is sanctioned by the most powerful collective thought of the group. Thus, to take the most religious legislations, the Koran easily allows us to divine the individual intentions that Mahomet entrusted to the powerful collective thought which constitutes the Moslem's religion. Thus the Hindu Law is essentially religious. This is not saying that the provisions which govern each caste have any relationship whatever with the dogmas of Brahmanism. On the contrary, it is very probable that customs of very different origin have, for political reasons, received the sanction of the authority of the Brahmins. Finally, Christian canon law is composed, in large part, of secular elements.

By the technic of its elaboration and its interpretation, and by the sources from which it is derived, it is almost entirely individual. It is impossible to consider it as a product of collective psychology.

(2) *Collective conception of magic preferable to the individual conception.*

Especially is the origin of institutions of general interest to be attributed to religion. Institutions of private interest (i.e., personal property and the law of obligations) have developed under the protection of a somewhat related conception, that of magic. This has recently been established in a manner which seems conclusive, by researches both ingenious and well-grounded. Magic has favored the birth of individual rights; the magician has been the protector of our most modern juridical conceptions. That is not at all surprising; for the majority of sciences, arts, and industries owe something to these singular beliefs, to these mysterious practices, to this kind of irregular religion which spreads many correct observances and useful procedures.

In juridical matters, magic has worked principally by a course of intimidation. It exploited successfully the general belief in charms and in the power which certain persons are thought to have, in certain instances, of causing the death of any particular individual by devoting to destruction, with various ceremonies, the objects he has touched and the ground upon which he has walked. The victims of a robbery, in the spirit of revenge, cast a spell directly upon the robber, giving him in order to frighten him, the alternative of returning the stolen object or dying under the influence of the spell. Certain magicians made great pretensions of being able to discover thieves; they would sniff the ground, and, entirely naked or clad in special garments, force themselves into houses and perform certain ceremonies, and then announce whether or not the object had ever been brought there. Several

penal processes have preserved traces of these sorceries which constituted an often very effective protection for private property. Magic sanctioned contracts between individuals before the legislator was concerned with them. The parties would submit themselves to the consequences of the spell, and would themselves procure for their adversaries the means of fulfilling it in case they failed in their promises. The research of M. Huvelin proves therefore that magic has played an important part in certain branches of the law; a fairly large number of the riddles of juridical history are explained by taking this into consideration.

Generally we conceive a magician as a person who claims, in good or bad faith, an imaginary power, who invents singular practices, and, when need be, makes use of trickery to astonish or impress the public. We attribute to him the active rôle and to the collectivity which has confidence in him, the purely passive rôle of a dupe in the hands of an impostor. One of the works of MM. Hubert and Hauss proves that this conception is historically false.

Both magic and magician are creations of collective psychology. Because certain individuals are abnormal in appearance, or are abnormally situated, opinion attributes to them supernatural powers. Popular sentiment creates magicians without consulting those to whom the quality is attributed. People believe in them because the belief of each individual depends upon that of the others. They have heard, under impressive circumstances, accounts of wonders which have been performed; they were present in a body at some of these performances, and are mutually convinced that they beheld marvelous things. The sorcerer has little to do with creating the belief in his power; the community wants to believe in him.

He would, indeed, have to do a great deal to persuade them that he is only an ordinary man. He is in

that psychological state — in which we all are, more or less — which inclines us to harmonize our conduct with our social condition, to the opinion which is held concerning us. Even in our times, a certain power impels us to uphold the type, the character which others conceive us to have, and to perform the duty which our family, friends and acquaintances assign to us, even when it agrees with neither our tastes nor our talents. The sorcerer is a sorcerer because he is believed to be a sorcerer, even if he does not wish to be, just as he who has the reputation of joking is obliged to jest even if he has no inclination to do so. The serious man, the man of steady morals, is maintained in his course of conduct by the general respect accorded him; his neighbor, a good-natured rake, is known and excused as such. If their rôles be reversed, if the serious man become the rake, and the rake, the serious man, there will be a double revolt of public opinion which will be vexed by the triumph of virtue quite as much as by that of vice. Both disturb its habitual conceptions. Opinion likes everyone to remain in his own place, that is, in the practice of the virtues and vices which it has attributed to him.

To be sure, we are not obliged to obey opinion. But the act of making our appearance in a new light requires a certain effort; to clash with the conception which is held of us, to wish to substitute for it another which is more favorable or more unfavorable, is a real labor possible in our day but probably very difficult formerly. The sorcerer would probably have been unable to make himself mistrusted. It is quite likely that seeing everyone else believe in his power, he believed in it himself. At least he could doubt neither its importance nor its utility.

In the same way, magic is not the work of the magician. By imposing his profession upon him, opinion has also imposed upon him his sphere of action and the rites

which he must employ. Everyone knows what he is supposed to be able to do; no one would believe him if he dared to do more. We know how he ought to act; and would desert him if he acted otherwise.

We believe therefore that, in its broad outlines, the collective conception of magic should be preferred to the individual conception. Thus general and juridical magic have been observed and described with much clearness of insight, by the disciples of the Durkheim school. But when it has been a question of connecting their conclusions from these observations with the general principles of the system, these disciples, in order to remain faithful to the principles, have been obliged to sacrifice a part of the force of their personal logic. They have refused to "revise the idea of the social" as Durkheim formulated it, in spite of the fact that this would have been the rational outcome of their labors.

(3) *Confusion of the collective and the social, a source of false distinction between religion and magic.* The idea of the social, as they conceive it, involves the psychologic unity of the group. The group can have but a single mind, a single consciousness. From it the individuals imbibe their beliefs, and consequently these beliefs are always allowable and even obligatory. For this school, a collective thought in disharmony with society is nonsense.

Now primitive societies are in communication with the gods through religion. Through it, men can appease and render favorable the supernatural powers, and interest them in their plans by vows, sacrifices and rites of a varied nature. Religion is a social belief, a product of the collective activity of the group. Magic is a product of this same activity and is based upon beliefs which emanate from the same psychological being; it is likewise addressed to the gods by similar proceedings and should have the same result in appeasing and rendering them favorable.

Is this not saying that magic and religion are one and the same thing? And yet, in the majority of civilizations and often during the whole course of their development, there exist religion and magic, priests and magicians. Everybody knows there is a distinction and there ought to be some easy means of making it.

They are recognized in this way; the priest acts in public, sometimes with the coöperation of the whole people. He who wishes to perform a religious act does not conceal himself. Religion is generally supported by the public powers. On the other hand, the sorcerer and he who has recourse to his offices always act more or less in secret and by secret rites. They are, moreover, very irregular in the amount of care they take to preserve this secrecy, for sometimes the public powers tolerate and even encourage them, while at others, the same powers strenuously forbid any act of sorcery and punish very severely those who are guilty of them.

Why is society ashamed of beliefs which it has itself fashioned? Why does it persecute or censure the sorcerer upon whom it has itself imposed his rôle and the person who employs him, when everybody believes in the efficacy of sorcery? We cannot censure the belief in magic, for it is common to all; nor magical rites, since they are of the same nature as religious rites. What society, in so far as the collective body is concerned, regards unfavorably is that the sorcerer places himself at the service of particular persons, that he takes advantage of the public power when he recognizes the common belief in private interests. Magic starts from religion, becomes detached from it, assumes an unlawful character, and conceals itself more or less in darkness where it allows everyone to defend his own rights and procure for himself particular advantages. Thus has been given a very ingenious explanation — admissible at first glance — of the anti-social institution, magic, a conception which with-

out that explanation would be very much like Ibsen's fish that was afraid of water.

Unfortunately, the facts by no means authorize the assertion that magic differs from religion only in the way it is used. It has been clearly shown that both express beliefs collective in their origin, and that the various elements of the magical and the religious act are apparently very strikingly related. They are not opposed to each other by nature. They may both address themselves to beneficent or malevolent deities, may both attribute to certain objects wonderful properties, and both are generally of a meticulous formalism. It cannot be concluded from this that there has been any time in history when the two institutions were identical in form and substance. For that to be true, there would have to be cited to us a single instant in any civilization when the priest and the sorcerer had exactly the same beliefs, performed exactly the same ceremonies but when, nevertheless, a distinction could be made between them.

Quite to the contrary, the sorcerer enters into competition with religion by processes which are entirely his own. Sometimes he revives abandoned rites and poses as the representative of religions which have been vanquished but are still held in memory by the people. Sometimes he parodies the official cult, says the prayers in an opposite sense, makes the signs backwards, thus showing that there exists between him and religion a systematic opposition, a rivalry.

If the magician were simply the Prometheus who steals the flame from the altar of collective beliefs in behalf of individuals, why would he not give it as he received it? If he and his followers believed in the efficacy of the religious act, why would they dare to change it, ridicule it, and sometimes profane its gestures and formulas? Is it not through lack of confidence in the physician that one appeals to the medium?

On the other hand, have official religions ever refused to protect particular interests? The paganism of the Greeks and Romans is most certainly not an instance. Perseus complained bitterly of the selfishness of the vows which were addressed to the official deities and enforced with showy sacrifices, and examples of immoral prayers are not rare in the literature of many nations. I do not know whether an epoch could be cited that was otherwise in this respect. If such were the case, those who practiced sorcery would soon have outlived their usefulness, and it may be asked how they were able to survive for so long a time their reason for existence.

Finally, if magic had been anarchy, it would not have been able to beget any law and bring about any sanction of private property or obligations. Magic furnishes to individuals an imaginary but powerful weapon, without determining who has the right to use it. The robber could as well cast a spell upon the robbed, as the robbed upon the robber; the innocent and the guilty, the honest man and the fraud, were equally exposed to the risk of being the victims of sorcery. The intervention of the law was necessary to regulate sorcery, to permit it in certain instances, to prohibit it in others; that is to say, magic was not able to serve in establishing private rights except when these rights had been officially recognized as legitimate. Legal systems which impose magical procedures for the discovery of crime are even cited. It is possible, moreover, nay probable, that even without the intervention of the public powers, general belief caused the sorcery directed against the one who was in the wrong to be regarded as more formidable. That none the less implies the recognition by the collectivity of the legitimacy of the act that is guaranteed by magic.

On the other hand, by recasting the idea of the social, it is easy to dissipate the difficulty. If the political, even the primitive, group, is not, as I maintain, a psycholog-

ical unity, but only the environment in which collective thought of the most varied nature may arise and develop, the respective positions and the different characteristics of magic and religion are still comprehensible. They may not both possess authority for the same men united under the same conditions, but perhaps for these same men united under different conditions, or for a part of these same men other men differently grouped. The collective being which believes in religion is not the same as that which believes in magic, certainly not when both inhabit, so to speak, the same country.

Perhaps these two categories of belief do not affect the same minds; perhaps they affect the same minds submitted to different influences. Religion is official collective psychology. Religious emotion seizes upon a crowd assembled in the temple at the moment of sacrifice. Each carries the memory of it to his home; but with the individual isolated, it has a tendency to diminish sensibly. Magic is a vague and obscure current of opinion which impresses the individual because he does not know how many share it. It is secretly communicated by recitals of parents to their children, in small and intimate gatherings, or by other unknown means. It carries with it the proof of an instinctive mistrust of the individual for what is official (for whatever tries to impose itself upon his conviction, and to which he gives an adherence more apparent than real) and of his leaning towards anything that has the appearance of attempting to conceal itself. The psychological force of magic may moreover be very closely related to the psychological force in religion and in politics. There exists then no hostility between these three powers; they are quite in accord and are complementary to one another rather than in opposition. Society tolerates, encourages, and uses the sorcerer for the general need. In other civilizations, the sorcerer is condemned, prohibited and persecuted, even when he is known to do

good. Thus individuals will be prevented from regaining their health through his agency. He is not persecuted because he does harm, but because the collective thought from which he emanates is incompatible with the religious or the political idea. The essentially fluctuating character that has signalized the relation between conceptions of magic and of religion and of society, is very easily explained if we separate them into three types which are independent in their very origin; but this character becomes incomprehensible if they are regarded as the product of one and the same cause.

We have laid stress upon researches which, in their subject, often seem outside of juridical history; perhaps we have criticized them more earnestly than our ability justified. Yet they are of foremost importance in the establishment of a historical method as well as in the philosophic understanding of institutions. One proves magic to be the source of individual rights, the other characterizes the nature of magic as a product of collective thought; and these conclusions, which appear completely justified to us, throw a new light upon the beginning of private property and obligations. But ought we to confuse the collective and the social, to admit the thesis that the thought of the group was the sole dominating force, and governed human conceptions as a whole until magic arose and liberated the individual interest? We do not think so. The law has a collective but not a social origin. The collective mind, which presents certain constant characteristics, may appear, however, under very varied forms; it may be, according to circumstances, lawful or unlawful in the eyes of the political collectivity. We refrain from the statement of any general formula upon the relations between these several psychological forces, and obligate ourselves to substitute, in each instance, special analyses for the general syntheses which are presented to us.

2: DOUBLE TENDENCY OF JURIDICAL SCIENCE. Thus the law is collective in its religious and magical roots. This is not saying that there was nothing individual about it in its first stages. We have pointed out an example of this in the sources of penal law, and we believe in the primitive collaboration of psychological forces of different natures. But, in order to simplify the exposition, we set aside, for the time being, the original rôle of the individual, and will consider the law as a product of collective beliefs.

Law exists then under this special form where it has to be upheld in its every application by the spirit of the crowd or tradition. It presents a vague and incoherent aspect. Every time that a new case is presented, people hesitate; everybody tries to find out what his neighbor thinks instead of seeking the solution of the matter in reasoning by analogy or by "*a fortiori*." But every human thought is capable of assuming an individual form. Isolated persons can reflect upon juridical questions, bring together, classify and compare the decisions of popular tribunals, and look for their "*raison d'être*"; in a word, can apply all the force of their personal logic to custom and to juridical decision, and accordingly transform their nature.

Every human thought is capable of being systematized, of changing its base, of substituting for the communal emotion, for the unreflected opinion which was its primary cause, a more or less sound course of argument. But the various arts and sciences have this power to very different degrees. For instance, traditional learning is completely at the disposal of the scholar, who is entirely free to accept and reject whatever he pleases. Philosophy and the natural sciences have been privileged in this respect. But there are other cases where the collectivity, public opinion, never renounces its right of surveillance over private work. The moralist, the jurist, the artist, the priest, the sorcerer, and even the physician, is and has

always been obliged to respect certain principles, certain opinions and certain dogmas. In the first place the jurist collects customs and judicial decisions. He does not invent them and if he finds them unreasonable, he cannot for that reason omit them nor add to the law. No more can he employ a technic which would be above the intelligence of those who have to study the laws. Religion becomes individualized in a way different from the law; its dogmas are no longer inflexible, but for that very reason, the rigorously logical deductions which one brain draws from these dogmas may the more easily, in spite of their subtlety, become imposed upon the masses.

Now we have admitted that primitive law under its collective form was fused with religion and magic. Consequently juridical science will show a double tendency to become, on the one hand, organized into an independent science, to become secularized, and on the other hand, to become more scientific, individualized. But, according to the civilization, the double phenomenon has been presented in a different order. Certain juridical technics (Hindu, Roman, Hebrew, and Christian canon law in certain institutions) were formed by religious logic; the priests had reflected upon them before the laymen; and when secularization began, the law was already individualized. On the other hand, among the Germanic peoples, juridical secularization is very old, and individualization, or juridical science, very recent. Institutions remained for a long time under the régime of collective interpretation. If the logic of jurists and the mentality of practicing lawyers are so little alike in various countries, this is due, in great part, to the fact that certain laws preserve the traces of processes of religious individualization, while others have been obliged to find their method and their practical application elsewhere.

Magic, in its turn, had its schools and its scholarly partisans who investigated its rationale. Did it still contain

juridical elements at this epoch? Is there in any country an institution which was submitted to the personal criticism of the sorcerer and thus became individualized through magic? That is very possible. But studies upon the law of magic are too recent for an answer to be possible at this time. We shall revert to this question in our history of juridical technic if there is occasion.

3: SUBSTITUTION OF COLLECTIVE THOUGHT FOR GENERAL CONSCIOUSNESS. Juristic treatises and, up to a certain point, judicial decision, tend to make of the law a science of individual logic which dominates the crowd and opinion. But in becoming too abstract, this science becomes unpopular. As for the jurist who has just set forth in public his quasi-algebraic reasons in order to justify solutions which might appear arbitrary or tyrannical, he wonders if the people are not laughing at him. The same doubt seizes the judge, whose work is more appreciated by the public at large than is any juristic labor. He easily sacrifices a deduction which naturally follows according to the rules of the syllogism, but which his circle of friends and acquaintances would not ratify. The jurist begins by protesting; he ends, however, by wondering whether solutions useful for the world of business can be found in his library. He mistrusts himself, and in his turn contributes to restoring to the law its collective form.

Then these principles are established, that the law ought to be at the time of its creation the expression of the will of all, or, at least, of the greatest number, and that this originating, creative thought and all the modifications which it may afterwards undergo in the country ought to be instilled into the judge and the jurist.

These principles — in so far as they are principles — are not open to criticism, at least as a whole. It is probable that they would triumph over every obstacle quickly enough if there were any practical means of knowing the

real thought of the majority. Unfortunately, these means do not exist. We are completely ignorant of this general consciousness which might rightly claim the title of sovereign, and we are obliged to substitute for it collective thought, the laborious concoction of the crowd or of opinion.

Popular assemblies are crowds; parliaments of representative governments are crowds chosen in other gatherings, namely electoral pollings which are as incoherent as the legislative assemblies. This is not saying that this manner of making the law is to be condemned and has not its advantages; but it is not altogether that of faithfully expressing the thoughts of a people.

The referendum is beyond question much the most perfect system for disentangling the ideas of the majority. Practically, we can scarcely see how any better could be imagined. Scientifically, it reveals to us currents of opinion rather than the sum total of personally reflected thoughts.

As for the judge and jurist, they seldom have any means whatever of knowing what the country thinks upon a question of law or legislation. When they claim to be interpreters of the common conscience, they are indulging in a wild flight of the imagination.

Moreover, when a people or an assembly has gained a clear idea of the difficulty of regulation and interpretation, they voluntarily allow the most industrious and skilful to frame the law, and confine themselves to ratifying or rejecting it, so that the law relapses into the domain of scientific and individual logic.

Thus the elaborative forces of the law act and react upon one another. The estimate of what springs from popular collaboration and what from personal labor must be made from hour to hour.

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CHAPTER VI

PSYCHOLOGICAL ELEMENTS OF THE LAW

§ 1. PSYCHOLOGICAL CHARACTERISTICS OF JURIDICAL FACTS. —
§ 2. THE LOGICALLY AND THE HISTORICALLY SIMPLE IN PSYCHOLOGY. — § 3. HETEROGENEITY OF PSYCHOLOGICAL CAUSES. —
§ 4. PSYCHOLOGICAL EMBRYOLOGY. — § 5. CHARACTERISTICS OF JURIDICAL PSYCHOLOGY.

§ 1. *Psychological Characteristics of Juridical Facts.*
Those who demand laws or are disposed to accept them, as well as those who frame, vote for, promulgate, interpret, obey or disobey them, find themselves in a state of mind in which they might not act as they do act, and might not take the attitude toward the law that they do take. The sum total of the cerebral labor which accompanies the origin of a work of theoretical or of practical law is the most intimate cause of its production and of its characteristics. Every juridical fact is beyond question a psychological phenomenon.

From all time, celebrated legal texts have been encompassed with legends which manifest the state of mind of those who formulated and of those who accepted or demanded them. No interpretation of any legislative reform passes which does not set forth the good intentions of the legislator, his expectations, and the means by which he hopes to be able to influence the minds of individuals. Jurists have always psychologized, — a rather poor psychology, indeed, and one that is doubly vicious — juridically vicious, because it invented “ex post facto” ideas or sentiments which did not correspond to those which really played a part in the making of the laws. Thus, honest Thomas Diafoirus deluded himself when he carried op-

timism to the point of believing that the old custom of marriage by rape had been invented to spare the modesty of the maidens of antiquity, and to save them any occasion to blush while acknowledging that marriage would be agreeable to them. Down to comparatively recent times, lawyers have often possessed quite as little insight into the psychological explanation of ancient and even of modern laws. When they were not mistaken and succeeded in reproducing the true moral atmosphere in which the law originated, they did it in terms of ordinary psychology that were badly analyzed and of no possible scientific value.

The question resolves itself at the present time to this, whether a genuine psychology, borrowed from professional psychologists and based upon history and anything else that may aid us in an understanding of the past, will be able to make us realize in what way the law is a psychological phenomenon, — how it is formed and transformed by human thought. Needless to say, we do not expect to present all the ideas or the sentiments of those who have taken part in the framing of a law or been parties in a law-suit; that would be time lost; it will be enough to discover the principles which would enable us to point out approximately what they might have been.

In the various acts of human life, the brain does not take the same part, does not play the same rôle. (a) There are some which are the product of reflection, of reason, which performs a logical operation — often a difficult one — before culminating in the result. (b) Others are preceded by more or less lively emotions, are executed in a moment of anger, fear, or pity, and thus pertain to the affective or emotional life. Finally (c), in other instances, a man obeys forces which are foreign to him; sometimes it is impossible, or nearly so, to resist them; in spite of himself he does what he considers unreasonable or what is contrary to his temperament. At other times, outside pres-

sure is much weaker, but he obeys it just the same, perhaps because he has no reason for not obeying, perhaps also because it is his interest to do so. He is like a well-trained horse who allows himself to be guided by the slightest tightening of the reins, and does not wait until his mouth is made to bleed before he submits his will to external forces.

Obedience to a material force always remains a psychological phenomenon. It is true that if this obedience is constant, and automatic, is invariably repeated every time that the impetus is given from without, this psychological state will not be very interesting. This will scarcely be anything more than the knot by which the string is attached to the jumping-jack, and if we prove once for all that it is well tied, we need no longer take it into account and can connect by a direct relation of cause and effect, the movements of the hand and the gestures of the wooden figure. Now men have strings tied well enough for certain material and external forces to act identically the same upon the large majority, but too loosely for any one to be able to affirm that any particular individual will necessarily be obliged to submit to their influence. The sciences which are concerned with humanity taken in compact groups will necessarily perceive how much it allows itself to be guided by the external circumstances of life. Thus political economy, statistics, and, perhaps, sociology, have the right to employ objective methods, because they are the sciences of the passive man, of the fungible man, who, in a given situation, will on the average always act the same. Juridical science is a science of the active man, where the averages, their progression and their recoil, are of little interest, but where a single original personality may be decisive in the making of the law. What is a materialistic cause for the economist-historian is an intellectual cause for the jurist-historian. The former sees the main body of the great

mass of human beings following uniform directions according as the objects which enable them to live, increase, decrease or displace one another. He will be able to study economic man face-to-face with self-interest, like iron in front of the magnet. The sciences, on the contrary, where the individual may have a decisive value (psychology and legal history) will have to take account of the fact that if man obeys things, the force which makes him obey is in himself and not in the things, and consequently varies according to the cerebral constitution of each.

Thus three kinds of causality possible for the development of the law are connected with psychology. In the history of the law we may imagine (a) rational causes; (b) sentimental causes; (c) material causes.

These three orders of causes are sometimes combined in juridical elaboration. The obligation to adapt oneself to the external circumstances of life calls forth various reflections and feelings; a work of sentiment is not necessarily unreflective, nor a work of logic always cold and impartial. One, two or three of these psychological elements may coöperate in a single concrete phenomenon. It is none the less necessary, however, to make a theoretical analysis of each.

§ 2. *The Logically and the Historically Simple in Psychology.* We wish then to ask psychology to tell us what is and what was the man of reason, the man of feeling and the selfish man. For present man, no doubt, it will be able to reply; but can it do so for the past? Much in human mentality has become changed since the primitive ages; it is to be hoped, however, that something remains invariable, that something is identical in the brute and the highest human being, for if everything, even down to the simplest forms of thought, has changed, it is useless to set our hearts upon the solution of a problem the very elements of which we do not possess. We cannot under-

stand the thoughts of another human being except by comparing him to ourselves, by analyzing our ideas and our impressions, and by simplifying, enlarging and making of them new combinations. Without the discovery of a single common element, no matter how simple, all this becomes impossible.

Is there such a thing as a psychologic invariant? How is it to be determined? Very often what is simple logically is confused with what is simple historically, and what is invariable logically, with what is invariable historically. We have often been deceived into thinking that by disengaging from our nature what seems most crude and rudimentary, we bring to light what has been in existence in the human, or even in the animal soul since the earliest times. We believe that we suffer with tooth-ache just as one suffered with it a hundred or a thousand years ago and as every animal similarly affected suffers. And in that we are, perhaps, mistaken. Sensations must have changed as have thoughts, for bodies have changed as well as minds. History has modified the human species in its physiological as well as in its psychological properties. There is still another reason for believing that our simple sensations are no longer those of our ancestors. According to circumstances, thought increases or diminishes them. Certain physical pains may pass almost unnoticed or be particularly severe, according as the social or the sentimental life disregards them or forces our attention upon them.

Thus, not in the broad domain of possibilities, but in the restricted realm of history, the data of abstract psychology are not as unalterable as one might suppose. It is certain that elementary relations which, on account of their logical simplicity, have been considered necessary to the general mechanism of thought and animal action and accordingly eternal, hold only for a particular age and environment. That is all the more incontestable since

nearly all philosophers fail to appreciate more especially their own environment, and since the most actual and readily perceived realities show us most easily the relativity of their teaching. It is thus with the relation between desire, will and action. It is often said "no matter from where the desire springs, it determines the will, and the will, the action." That seems to be logical and to explain satisfactorily the psychological mechanism. Perhaps, indeed, these beautiful, phosphorescent, translucent jelly-fish which swim in the aquarium of Naples have so simple a psychology. Perhaps they can will what they desire and desire what they will. But for a long time, civilized man has recognized only a very accidental relationship between desire and will. Agreement between desire and will presupposes an accord of the power of action and that of thought which has been destroyed for a very long time. The man of the most meagre mentality or of the greatest force can no longer establish this equilibrium which no doubt existed originally.

What may we desire? "The existence of God, the immortality of the soul, the realization of an ideal," or more simply, "the affection of certain persons, the success of certain convictions"; more selfishly, "a certain notoriety, long life and good health, good luck in the lottery, and a bottle of good wine at every meal." The realization of our metaphysical or our sensual desires does not depend upon our actions. Desire cannot be the prelude of the will.

What may we will? What we can, that is to say, almost nothing, acts of whose consequence, neutral or disagreeable, we are ignorant. If the will meets a desire in its path, generally it will not even take it into account. Certain edibles displayed in a shop-window create desire, but we pass them without temptation — for the idea of temptation is already a psychological archaism — to find the simplest meal, which is the one we will,

This is not said in a spirit of pessimism; modern man has his pleasures, but he does not owe them to his desires, which he can seldom gratify, nor to his will, whose agreeable or disagreeable consequences he cannot foresee. Pleasure is given "to boot," as a reward for acts whose import he has not foreseen.

But — what is characteristic — this divorce of the will and the desire does not exist in the same degree with all individuals and all peoples. Certain events accentuate it, others operate in a contrary direction. Thus Epictetus and Epicurus each proposed a process by which will and desire might be reconciled, the individual taught to desire possible things or will desirable things, and their good advice has not been lost upon everybody. Thus the rôle of desire is to be understood only through history and eludes systematic psychology.

Many other ideas, equally simple from the point of view of logic, are in the same situation. It is affirmed that emotion alone and not reflection can instigate action; this is absolutely false for modern man, though perhaps true for primitive beings. The relations between intelligence and the emotions, intelligence and feeling, the will and feeling, correspond, according to the time, to irreconcilable formulas. History has affected us much more than we think. It has not developed logically the elementary principles of primitive brains; it has upset them at the chance of circumstance.

§ 3. *Heterogeneity of Psychological Causes.* It is affirmed that everything in the living physiological world develops from the simple to the complex and that it must be the same in the moral world. This is very possible. We should be astonished to see savages creating philosophy as Plato did, mathematics as Leibnitz, or even, relating to us as does Stendhal, the various phases of their passions. Undoubtedly, they think much more simply. But can we discover this simplicity in ourselves by analyzing our-

selves? Is it a logical simplicity? But we have just seen that assertions which are presented as very simple truths are contrary to our own psychology. We do not know what is simple in ourselves and yet we claim to know what is simple in a being with whom our relations are now very vague. The thought of the savage is assuredly very simple objectively, but may it not be for us something very strange and complicated?

Let us admit that we understand our earliest ancestor and his psychology; if we add to him, by degrees, the more complex qualities which bring him nearer to modern man, we shall have traced a picture of his improvement that is logically very acceptable, by a purely deductive process and without having had to consult history in the least. "Primitive man is essentially selfish, for it is much simpler to consider oneself than others. He becomes interested, little by little, in his relative, his neighbor, his wife and his ox, for the advantages he derives from them, afterwards for the pleasure of feeling himself with them" — and we arrive by insensible gradations at the noblest altruism. That is a model of those easy and seductive "evolutions" which have threatened for some time to become the method of psychological history. In reality, we have applied to humanity our process of personal education. It would be of quite as much value to affirm that men invented the definite article in the first place, and declined "*rosa*" before "*dominus*," for it seems very simple to us that this should have been so. The law of transition from the simple to the complex, when applied to mental development, can be of no use; for what is simple to us is, perhaps, not so historically, and it is impossible for us to appraise the real complexity of thoughts.

Besides, there is a reason which prohibits the belief that psychological elements have evolved from the simple to the complex by a slow and regular process. Ideas and feelings, for a spiritualist as well as a materialist, are

abstract things which depend upon the brain. In psychology like does not necessarily engender like. A feeling of anger, affection or pity which crosses my soul or a work of logic which occupies my mind is no more related, genealogically, to phenomena of the same nature which have been produced in the past, than is the light of the lamp which I lighted this evening the offspring of that which illuminated the room yesterday. Brains only can become larger and of a finer quality through toil and by heredity; and like lamps, these brains will, according to construction, give varying degrees of light, and what has contributed to make the brain such as it is cannot be called the moral cause of this light.

Those who speak of literary, artistic, moral, or juridical evolution are not absolutely wrong, provided they specify that this juxtaposition of likes over a period of time in no wise implies a uniform and continual influence of what preceded upon what follows, and that there cannot be any appreciable causal relation between two moments of one and the same art, or of one and the same institution.

With stronger reason, a historical comparison of psychological phenomena which have not the same nature but the same object is absolutely deplorable, if care is not taken to exclude every idea of casuality. It is allowable, indeed it is even interesting, to describe the various sentiments which men have had, by turn, for their gods and their religion, and husbands for their wives. But to affirm that religious sentiment is derived from fear because the savage experiences this emotion before his fetich, or that conjugal love springs from sexual desire because primitive unions were, perhaps, solely brutal, and of a sensual selfishness, is a flagrant violation of every principle of causality and of historical logic. An object which excited fear may later excite emotions that are very different in their characteristics and their origin; and to make these last spring from the first is an error almost

akin to connecting by ties of relationship all those who have lived in the same house.

§ 4. *Psychological Embryology*. In order to construct historical psychology, we must discover the simple, the invariant, that which has not become changed in the human brain through contact with civilization. Since the rational simplification of modern man can only lead us into error, observation of simple beings is the sole method which can furnish a basis for our study. Four kinds of simple beings may reproduce to a greater or less extent the original elements of psychology; namely, primitive people, savages, children, and animals.

(a) Primitive men, our ancestors of the prehistoric ages of cut, of polished stone and of bronze, would furnish a certain starting point if we could succeed in understanding them. Unfortunately, we cannot do so. Without doubt, paleoethnography furnishes valuable information upon their manner of life, their industries and, indirectly, upon some of their traits of character. They lived in rather small groups, fought among themselves, and loved finery. But it is a far cry from this to understanding the mechanism of their thoughts and their emotions. Nevertheless, the information furnished by this science is not to be neglected, as it provides us with a valuable means of checking up our investigations.

(b) Savages are perhaps very similar to the ancestors of superior races. According to a very plausible theory, they are backward people, who traverse the same road but with a certain slowness. They are therefore no longer, properly speaking, primitive. They have a political and an economic history, rudimentary, to be sure, but none the less real. While admitting that certain of them have undergone only the slightest variations, the fact of their having remained in a state of inferiority for a much longer period than others suffices to show that their psychology is not the same. Moreover, everybody has not a savage

at his disposal. The labor of the ethnologists has no doubt been vast; its results have been rich in information upon the customs, the institutions, the religion and the aesthetics of the savage. From the psychological point of view we can derive much less from it; its conclusions are less reliable and difficult to control.

(c) The child is a primitive being, an organism which only by degrees assumes connection with its social and material environment. Its brain, void of experience in the beginning, will be, in a relatively small number of years, transformed into that of the social and modern man. It passes from the simplest to the most complex psychology with the degree of swiftness which best lends itself to our observations. To know the instinctive method of a being before education has led it into the general and social forms of thinking, is a valuable thing no doubt. But children are neither primitive nor savages, but the descendants of civilized persons. Before they are educated, when they are still only the products of remarkably varied hereditary combinations, their logical and their sentimental predispositions are remarkably odd, complex, peculiar and of little uniformity. When savants like Darwin or Preyer who have had something else to do in life besides taking care of children, affirm that fear, anger and affection are manifested so many months or days after birth, we can only smile at such observations.

(d) The study of the thought of animals (zoölogical psychology) is the most valuable of the four sciences which we are examining with a view to fixing the foundations of the intellectual history of the human race. It is not that the animal is more like primitive man in character than is the child or the savage. If it were a question of making a portrait of the virtues and the vices of our ancestors, of divining their ways of acting and their manner of life, the observation of animals would not be of any great value; for we should not know to what type they

should be compared. To the monkey perhaps, because of the resemblance in conformation? But this is an animal relatively very inferior from the point of view of psychology; and, moreover, species which are very much akin as far as general conformation is concerned, are very unlike in habits. It would be entirely arbitrary to affirm that primitive man lived like a monkey at any moment whatever of his history. Besides, we desire something quite other than an intellectual and sentimental description of a being whom we have no means of understanding very accurately; we are seeking the elements of abstract psychology, definitions of desire, sentiment and imagination, applicable to the whole course of human history. And in what concerns social psychology, we are trying to discover the different causes which arouse the social spirit among animals, and the diverse effects of community life. Comparative zoölogy is, from this point of view, infinitely better supplied with material than the above mentioned sciences; which does not at all mean, however, that they can be entirely neglected.

§ 5. *Characteristics of Juridical Psychology.* Law is a psychological product. If we abandon the attempt to study it through psychology, we abandon the attempt to understand its true nature in order to content ourselves with observing its various manifestations. This is, however, what would have to be done if the first task were impossible. What is the good of trying to explain what cannot be explained?

It might be impossible to find the psychological explanation of juridical formations for two reasons; in the first place, if we had no criterion by which to distinguish the variable from the invariant in the human cerebral mechanism, which, we know, is not the case; in the second place, if the law represented such accidental and unstable phenomena that it was impossible to describe them to even the slightest extent.

The psychological complexity of the law is, indeed, remarkable. In its formation and its application, it is sometimes collective and sometimes individual. It is the product of a current of opinion or of an adherence of the crowd, which may be spontaneous or may be incited by one or more individuals. The constitution of a people is not enough to make known the true relationship between the law and collective psychology. The complete historical account of the framing of each law is still necessary, or, at least, would be necessary for whoever would care to understand the psychological nature of each law.

Moreover, that is only a rather secondary difficulty. Thought and sentiment which are clothed with legislative authority, admitted into the juridical domain, or incorporated into a text, no longer have the same intellectual existence, and their relationship with the originating phenomenon may vary greatly at any moment of juridical life. Thus the sentiment of pity is and always has been a constant factor in modifying usages and laws. At the beginning of evolution, groups or individuals must feel really stirred in order to renounce a right acquired in their behalf or penalties legally decreed. The better the law is established, the stronger must be the emotion. One deviation from the strict rule through pity, allows a second deviation with a lesser sentimental impetus. The psychological phenomenon necessary to produce one and the same juridical effect continually decreases in intensity and ends by becoming reduced to zero. Strong compassion sometimes prevented primitive warriors from putting the vanquished to death, and the unpaid creditor from tearing the insolvent debtor to pieces. But the leniency granted the first time must have tended to become general, and little by little the proportions were reversed. Only the very hardest-hearted, those incapable of any emotion, would pretend to exercise their rights in their full rigor. One step more, and the measure of leni-

ency was imposed generally, without having been produced by the psychological phenomenon of pity.

Consequently, the psychological terms employed in law sometimes have a meaning corresponding to their original meaning, but very often one which is entirely artificial yet quite necessary to their new function. It is thus in regard to the idea of "will." It is said that the law is the will of the nation. Psychologically a nation has no will, because the nation is an abstraction. Furthermore, the majority of the citizens, even if we suppose them in favor of the law, have not performed an act of will in regard to it. They can desire the law, but they cannot will it, since it does not depend upon each of them but upon the result of the totality. To say that we are subject to texts which date back a century or more, by virtue of the will of living citizens, is a juridical truth but a psychological absurdity.

Intestate succession rests, in large number of legal systems, upon the "presumed will" of the deceased. In reality, it is not a will which is presumed, for the deceased might not have been capable of having one, notably, if he were insane. Assuming he was rational, he perhaps did not think of his succession; perhaps he did, opened his code, and found that the legislature had done its work well and that it was useless for him to make a testament. In neither case, was there anything which resembles an act of will in the psychological meaning of the word.

In the making of contracts, the "will" of the parties may more nearly approach the philosophical conception. This is, however, far from being a condition of the contract. A person might express orally or verbally the fact that he buys an object which he does not care to possess, because he is forced into doing it by considerations of propriety, without the sale's being vitiated in the least.

Thus the law explains, by the "will," acts which have

been willed, those which could have been willed, those which have not been willed, and those which could not have been willed. And it is not wrong in doing so, because this idea of will is juridically the same, through the ideas of liberty, authority, and responsibility which it contains. But it could not be transported into philosophy without, in each instance, submitting it to an analysis in order to determine to what it corresponds in reality.

Thus all intellectual and sentimental ideas are capable of being presented in legal systems under their real form or under an entirely artificial form; and not to be able to distinguish between them is very dangerous for the legal philosopher.

This fluctuation in the psychological character of institutions forms an obstacle to drawing inferences from the law to the morality of a people or of an epoch. Cruel legal systems do not necessarily imply cruelty, nor humane systems, kindness and benevolence. A nation of logicians may have an incoherent law; another people less profound and less analytical may have laws methodically arranged.

From the complex, which is the law, we cannot infer the simple, which is psychology. Because of this it is only the more important, the more indispensable, to have recourse to the science of thought to study this world of realities and appearances which constitutes juridical thought.

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CHAPTER VII

LAW AND EMOTIONAL LIFE

§ 1. SPECIAL INDIVIDUAL SENTIMENTS IN THE LAW: (1) RÔLE IN CREATION OF LAW; (2) RÔLE IN INTERPRETATION OF LAWS OF THE PRESENT; MODERN SOCIALISM; (3) RÔLE IN INTERPRETATION OF LAWS OF THE PAST.—§ 2. GENERAL AND SOCIAL SENTIMENTS IN THE LAW: (1) EMOTIONS OF SOCIAL SYMPATHY; (2) EMOTIONS OF SOCIAL SANCTION; (3) EMOTIONS OF SOCIAL DISTRACTION; (4) EMOTIONS OF SOCIAL CONTACT; (5) PURELY MORAL AND JURIDICAL EMOTIONS; (6) POLITICAL AND UTILITARIAN EMOTIONS.—§ 3. INFLUENCE OF SENTIMENT UPON THE LAW: (1) CONFLICT BETWEEN THE PRACTICAL AND THE SENTIMENTAL; (2) LEGISLATIVE AND JURIDICAL LABOR SENTIMENTAL IN FORM AS WELL AS IN SUBSTANCE.

§ 1. *Special and Individual Sentiments in the Law.* To nearly every provision of the law there corresponds a sentimental state which seems to be its explanation. Legal marriage protects, and at the same time limits, the sentiment of love; divorce is a remedy for an abnormal emotional state. Property is justified by the attachment which people feel for land, houses, animals and objects to which they have become accustomed. And as civilized man is not without interest in the future of persons and things which survive him, liberty in regard to the making of wills and testaments seems to have for its principal reason the guaranteeing to him of this satisfaction.

It is quite certain that when the law is in accord with the general sentiment of the people, they feel no need to change it. They may, however, be constrained to do so by foreign ideas which current opinion imposes upon them, or by some other external force. If institutions are not in harmony with the character of a nation, it tries to get rid of them; but for that to be possible, the amount of

personal initiative required must not be too great, since very often and for many different reasons people become resigned, and if the shoe does not fit the foot, they make the foot fit the shoe. Thus the agreement between a juridical provision and the general emotional tendencies is a conservative force which is assured of a long existence, provided that some force of innovation is not more effective. Peoples as individuals do not always regulate their lives according to their taste. They do so, no doubt, when nothing prevents them, but many things can prevent.

1: RÔLE IN CREATION OF THE LAW. It is, indeed, a relatively easy matter to explain why any particular institution favors or protects a particular sentiment. It is much more difficult to determine the rôle of the emotions in the creation of the law.

(1) In the first place, reformers very often intend to give pleasure to the whole or a part of the general public, but more often still they mean to be disagreeable. The legal history of certain countries would be meaningless if those laws were suppressed whose sole "*raison d'être*" was to torment one's neighbor. These laws are emotional since they spring from the rather singular but unquestionable pleasure that man experiences in annoying his fellow-man. With the aid of political history, laws of such origin are generally easy to recognize. Moreover, they rarely attain their aim, or do so only temporarily. Thus the French laws of expropriation for public purposes and for straightening streets, were invented to cause annoyance to and inflict damage upon one class of citizens. Nothing justified them at the time they were made; they were in certain respects laws of spoliation. But they were justified afterwards by the great works of public interest, which could not have been foreseen. Compared with the legislation of other countries in the same matters, the laws are seen to be quite liberal and protective

of private interests. So that dispositions malicious and annoying in their origin are capable of becoming, under certain circumstances, both acceptable and useful. Those who think that the legislator from their district is trying to make laws prejudicial to them, are wise if they remain quiet and refrain from stirring up any bad feeling. The law rarely succeeds in reaching those at whom it aims, and, on the other hand, there is no pleasure in annoying those who do not fly into a temper or complain.

(2) In the second place, we may look upon the legislator as the spokesman of a definitely determined sentiment which demands a law to defend itself or to attack an adverse sentiment. Every time that we are gratified or inconvenienced in any way, we do not mention the fact to our deputy. A few, however, cannot refrain from writing to their newspaper; the newspaper publishes the letter, an article is written upon it, popular impressions are gathered and a press-campaign is set in motion; then the legislative organs are called into service and the sentimental objection is subjected to its first serious examination. It is examined (a) from the psychological point of view: is the sentiment real, deep-seated and legitimate? (b) From the utilitarian point; would it not be dangerous to satisfy it? (c) From the legal point of view; does it not claim from the law a special privilege or only equality with other sentiments? (d) From the juridical point of view; is there a juridical form which might be favorable to it, or more than favorable? After such an examination, a rough draft of the law will be drawn up, and it will or will not be voted upon. Texts which deal with municipal questions furnish examples of numerous sentiments lately admitted to the juridical life.

The modern (legislative) mechanism is evidently applicable only to certain countries in our time. It has often been more difficult for individual sentiment to be admitted into the law. For this to be effected it was al-

ways necessary for the sentiment to manifest itself, then to become formulated, and lastly to be adopted. According to the country and the constitution, each of the three stages may be surmounted with more or less difficulty. The most violent sentiments are not always those which are the most successful. Some very worthy in themselves might conflict with the general indifference or might not be flexible enough to adapt themselves to juridical form. Others, more artificial, will have no difficulty in succeeding. Sincere sentiments must sometimes make concessions, must buy the concurrence of those who do not share them by the promise of material or moral remuneration. Thus the sentiment never wholly explains the institution.

2: RÔLE IN INTERPRETATION OF LAWS OF THE PRESENT. MODERN SOCIALISM. Unusual discretion must be used in the emotional interpretation of laws. The phenomena which we encounter there often appear, at first sight, very peculiar and of a nature to baffle those who would like to see in a text the photograph of an emotion. Take the juridico-sentimental phenomenon which we may observe with the greatest safety — that of modern socialism. It comprises a theory of organization, which is rationally open to criticism by the science of economics, and a sentimental conception, acceptable or unacceptable according to one's temperament. This conception may be analyzed thus:

(1) Indifference to the peculiar characteristics of things which no longer have any individual value but are fungible. One no longer loves any special field or house, but a field or a house of a certain value.

(2) Detachment from human individualities; substitution of general sympathy for individual sentiments.

(3) Desire of security, and regularity of life, with the least effort of initiative. Atrophy of desires which do not result from the necessities of everyday life.

Historically the causes that have produced this socialistic sentimentality are many and various. International politics has brought into the foreground peoples who do not as yet recognize individualist sentiments; great industries prevent the lower classes from owning property; the development of transferable securities has transformed the psychology of the upper classes who find their well-being in the use of objects which pass from hand to hand; life in the world, as it has become constituted in the nineteenth century by class-combination, centralization and cosmopolitanism, is an active cause of sentimental fungibility. When we are accustomed to chopping up our lives in conversation with people who are constantly changing, we can hardly be capable of any great affection for anyone. The socialist dreams of transforming gold into penny pieces for the benefit of the crowd; thus the worldling transforms his sentiment into money of base coinage. This is why one is right in saying that divorce without just cause (adultery) and free love are not in themselves immoral or devoid of sentiment. These are only socialist ways of spending one's energies.

Now—and this is what is of interest to us—among those who uphold socialism, a rather large number have very pronounced anti-socialistic sentiments. There are the good husbands who love their own wives and not those of their neighbors, their own houses and not their neighbors', their own dogs and cats and not the first dog and cat they meet in the street. And among those who oppose it, many have no less pronounced pro-socialistic sentiments; they are not attached to any one piece of ground, or to any one town, house, or human being, more than to another. After all, neither is in the wrong; but they look upon questions from the point of view of the social organization which they consider reasonable or unreasonable, without concerning themselves with what best suits their manner of living, loving and feeling. Thus the small

farmer is made to believe that he will always remain master and lord of his land; therefore he sees nothing inconvenient in the socialization of the property of others. On the other hand, very many conservatives preach and organize socialism of manners as the sole means of combating political socialism, without suspecting that the first much more than the second is repugnant to the person who has remained individualistic at heart.

This is an illustration of the fact that in the course of history many must have fought against what was dear to them because they could not distinguish the true characteristics of their adversaries, and in favor of what they would have detested had they understood it. Thus sentiment is a powerful but blind force; we see it hurl itself against institutions and lay them low; but against what does it direct its blows? This is very difficult to discover.

When an institution triumphs, the sentiments which correspond to it triumph also. If the socialistic organization is established, those who cling most to their family, and to objects which belong to them, those to whom the individual niceties of persons and things are most precious, will be obliged to become familiar with the great tavern that is prophesied for the future and will there lose a great part of their present mentality. Moreover, those who are socialists in sentiment at the present time owe it to the kind of life they lead, that is, to institutions which compel or induce their conformity. Must it be said in the final count that the influence of sentiment upon the law is purely an illusion while that of the law upon sentiment is a reality?

By no means; if the law can do violence to sentiments and transform them, the opposite phenomenon may be present quite as often. The art of tyrannizing consists in making a proper adjustment between the coercive power at one's disposal, and the changes to be effected in the emotions of others. If there are tyrants in the most lib-

eral legislatures, it is none the less true that there are limits to tyranny in the most absolute constitutions, that is to say, if the emotional life of a people can be directed by law, it never completely accepts this direction. Revolutions, seditions, laws unapplied or abrogated shortly after their promulgation, furnish us with numerous examples of this truth. Moreover, if the lawmaker who would unbridle all human passions has not yet been found, neither does there any longer exist the one who would subdue them completely; a fact which permits them perfect freedom of action in certain instances.

3: RÔLE IN INTERPRETATION OF LAWS OF THE PAST. If it is relatively difficult to calculate the individual sentimental cause in present-day legal systems, it is certainly much more so to do the same for those of the past. Emotions leave behind only vague impressions; by what processes can they be revived? The old system which, basing itself upon the adage, "Human nature does not change," applied to the institutions of the past the emotions which correspond to them at the present time, has almost or completely disappeared from every serious work. There are other processes of reestablishment that are wiser and apparently more positive; but these also are open to criticism in certain respects. Such is Jhering's method which makes selfishness the source of all human sentimentality. To display little optimism in regard to the moral worth and delicacy of feeling of primitive man, appears legitimate enough in principle. But more generosity upon the intellectual side is necessary. Now Jhering's primitive man is a perfect egoist, but one who yields nothing to the most intelligent member of any modern society. It may even be said that he is much more intelligent. To have understood by himself all that this apparently uncultivated soil of egoism can yield through cultivation by the scarcely natural processes of sacrifice and abnegation, would have required genius. For a brute

to understand how it is to its interest to be good, it would have to possess very superior intelligence. Now it appears, on the contrary, physiologically and historically established that intellectual power is a more recent acquisition than sentimental value. In every instance, primitive sentimentality must be developed with the primitive intelligence and not with the intelligence of civilized man. Otherwise the history of human psychology is indeed falsified.

Altruism is therefore not descended historically from carefully planned selfishness, but has its own life and its particular causes of development.

It is therefore dangerous to invent for the emotional life of man too simple an origin and transitions which lead too smoothly without shock or collision from savagery to the most exalted ideal. Here, as elsewhere, probability is the most seductive and treacherous of the snares spread for historical logic. It seemed very probable to the ancient historians that even our most remote ancestors felt what we feel; on the other hand, it appears very probable to minds imbued with evolutionism that what they consider imperfect preceded what they consider perfect. The two conceptions are nearly equally subjective and we cannot but be distrustful of them.

The emotional life of any age can only be reestablished by the aid of contemporaneous documents of that age. Studies of manners through literature or any other source may clarify the sentimental import of an institution. The historian-jurist no longer disengages psychology from the juridical text in order to relate it back to the same text. He prefers to seek his psychological information elsewhere. Thus Meynial studied "*Mariage après les invasions*" by reconstructing according to the "*Niebelungen*," the emotional character of the German woman. Flach interprets the institutions of the Middle Ages through the "*Chansons de geste*." Generosity, liberality, is one of the

virtues which is there glorified most highly. Without these impulses toward bountiful giving, sometimes prodigal, which were, moreover, often followed by regret, the multiplicity and even the nature of feudal concessions, as well as of donations to the church and to monasteries, and many other institutions would be inexplicable. In feudal contracts each party sought his own advantage no doubt, but how different from the psychology of modern bargaining where clause by clause is discussed and each side strives to obtain a maximum of profit. Finally, Lefebvre's explanation of the origin of conjugal community according to sentiment likewise appears partially true. Of course, if the wife had brought nothing to the husband, if the partition at the end of the community had not simplified from the beginning the adjustment of the conjugal life, and if it had not resulted on the whole in an equitable division of the common property, this system would not have been adopted; since its only advantage over the former system of the rights of survivorship is in favor of the family of the wife and not of the wife herself. But it is very probable that in accordance with the idea of collaboration, with the Christian desire of making the conjugal tie more intimate by the fusion of the interests of the husband and wife, this system was better suited than any other to the emotional state of that period. The most recent historians of the law are inclined, therefore, to take into account the individual sentimental factor in their interpretation of the juridical past. They exercise due moderation and discretion, while realizing at the same time that such a recognition is indispensable to the complete understanding of the creation of the law.

§ 2. *General and Social Sentiments in the Law.* The sentiments we have just studied are at once individual and special. These are more properly tendencies of man to retire within himself, and to follow his own impulses, which the law admits and protects in certain cases. They

require only a special institution, a part of the juridical domain. Each has its own province, more or less extended, from which it does not seek to deviate, nor can it claim to inspire an entire system of morality or of legislation. Conjugal or filial love has nothing to do with delimitation of a field.

But the emotional life further comprises general and social elements. They are social for various reasons: Some arise in groups through collective disturbance; isolated man could not have experienced such emotions with this degree of intensity. Others are moral satisfactions or penalties with which society rewards the individual, the emotional wages with which social labor is recompensed, or the emotional pain with which disorder is punished. A third category of social sentiments express the pleasure and recreation which society holds for the individual. A fourth comprises emotions sprung from contact no longer with society itself but with the human beings which compose it. Finally, the abstract principles that govern society — justice, right, etc. — may be manifested by phenomena which are more emotional than rational.

So that it is allowable to establish the following classification:

- 1: Emotions of Social Sympathy.
- 2: Emotions of Social Sanction.
- 3: Emotions of Social Diversion.
- 4: Emotions of Social Contact.
- 5: Emotions Purely Moral and Juridical.
- 6: Political and Utilitarian Emotions.

We do not claim that such a classification is complete and definitive. It permits, however, of a perhaps little more accurate analysis than has hitherto been made of the emotional life as affected by society.

Furthermore, it is not purely arbitrary. Each of these classes of emotions is general, in that through them the

majority may serve to establish a complete system of morality and may accordingly influence all the juridical dispositions of a legal system. Codes of practical morality, those which apply to everyday life and maintain order in modern societies, are formed of superimposed strata of these various systems that neither prohibit nor encourage the same acts, neither answer to the same formulas nor influence the same brains. This is why all codes of theoretical morality fail pitifully in their attempt to base upon a single principle that which by virtue of the diversity of the organisms is essentially multiple.

It has often happened in the course of history that disaster has followed in the footsteps of those who have longed to do most for the world, — who have brought to it the highest and most disinterested morality, and have tried to elevate human ideals, but failed because they wished to substitute completely their own principles for those which had hitherto guided humanity. They have often disturbed living, emotional morality in favor of theories which remained, for the majority, both artificial and almost entirely ineffective.

1: EMOTIONS OF SOCIAL SYMPATHY. Deflecting the word "sympathy" from its usual meaning, we apply this term to impressions which seize an individual because he is, or has been in a group, or a crowd. A spectacular display might have left him indifferent, and an act might have excited neither his admiration nor his indignation. Any attempt to point out his duty to him would have been in vain; he would have remained impervious to every individual explanation. But he has seen the crowd acclaim heroes and decry criminals, and has himself made the same outcries and gestures before he knew exactly why. Thus has he comprehended good and evil for the first time.

And this has not been for him simply practical and positive information; it has been true emotional educa-

tion. The crowd has taught him to shudder with horror before the acts which it blames, and to wax enthusiastic over those it admires. It has instituted the earliest form of his emotional life.

The intensity which the emotions are capable of acquiring in crowds has been an established fact for a long time. But whence springs this contagion of fear, anger, or enthusiasm which produces panics, riots and lynchings? Is it of rational or of purely emotional origin? Are collectivities emotional because they are credulous, or credulous because they are emotional? A crowd rushes upon an individual suspected of a crime and tears him to pieces without proof of his guilt. Is the fury on the part of the crowd explained by the extraordinary strength of its conviction or, did it, on the contrary, allow itself to become more easily convinced because it was the more furious? Both are true up to a certain point; there may be contagion of emotion without contagion of belief, and contagion of belief without contagion of emotion. Which proves that collectivities, like individuals, have an emotional and intellectual life which may remain independent of each other or be united.

Emotions of social sympathy occur in the course of history under a religious and under a secular form.

(1) *Religious Form.* Every religion is a system of rites, of beliefs and of sentiments. But dogmas survive in texts, and vanished cults are reestablished in detail by archæology; it is much more difficult to discover the sentiment. In the history of religions, the sentimental side is necessarily sacrificed, and especially in the most profound and most positive works, will the emotional element be proportionally of small importance. We can believe that the Carthaginians treasured a precious veil, the Zaimph, the loss of which presaged a public calamity, and that Hamilcar kept snakes and considered them the family genii. But even admitting the truth of Flaubert's narrative,

what were the religious impressions of Salammbô? We can learn nothing of this from any source whatever.

It can be affirmed, however, that there were religious emotions, for the cult and even the beliefs are inexplicable without them. Man conceived his first divinities under the influence of fear, and probably of a collective fear which seized the whole of a tribe in the presence of natural phenomena incomprehensible to them. Under this impression were instituted the earliest cults which were designed to appease the gods and render them favorable.

But the rite itself is productive of new emotions. The people meet together and proceed to the altar in larger or smaller groups; and the ceremonies performed there are nearly always of a nature to heighten individual sensibility. For instance they exalt or implore the gods, enumerate their qualities of power and beneficence, and chant the most exalted attributes ascribed to them by the myths. No doubt, such prayers have a practical, selfish aim, and are flatteries which cannot be sincere in all mouths; but the masses do not remain insensible. The gods appear to them in all the grandeur which is attributed to them. On the other hand, the suppliant dwells upon his own insignificance and unhappiness in order to attain what he prays for, and is himself moved by his own supplications, and feels that he is nothing in the presence of the celestial powers. Thus collective exaltation in the enumeration of divine qualities, and collective abasement in the enumeration of human weaknesses, are the most widespread religious emotions.

It is very probable that in a primitive age emotion is not willed. It is an accident which takes by surprise those who are affected by it. There is seen in it a proof of the efficacy of prayer, the response of the divinity, and the emotional element tends to become more and more an essential element of the religious act. The cult becomes

intentionally emotional; its deliberate aim is to influence men at the same time they do the gods, and later to effect new changes by exciting among men emotions which are pleasing to the gods.

Moreover, these religious emotions produced somewhat by chance become more and more varied in nature, and are not always in accord with the aim of the religion. They provide ancient peoples with impressive, æsthetic sensations, the feeling of peace and satisfaction afforded by the performance of religious duty; but they furnish also a means of collective approach to sensuality and cruelty. The poets and artists of classic Greece and imperial Rome are abundantly satisfied with the ancient mythology but not so the philosophers and statesmen. These wish to remodel traditions in order to make them productive of only sane and useful emotions. On the other hand, the official cult is not affecting enough for the lower classes. Their more brutal temperaments require more violent sensations. They turn to the orient rites, and the worship of Isis becomes popular.

Finally, to these indeterminate ritualistic emotions, religions that are characterized by more feeling, and especially the Christian religion, oppose determinate, obligatory emotions, and adapt the form of worship to their production. The principal aim of religion is therefore to produce particular emotional states. The glorification of divine power, adoration, is a duty of the heart and not of the lips. To every circumstance of life, to every day of the year, there corresponds a particular state of the soul in which the faithful ought, more or less, to participate. The Christian rejoices in the birth of Christ and in his resurrection, suffers in his passion and in his death, and lives in the life of the saint whose anniversary he celebrates. If he has sinned, the loathing of his fault, combined with a certain fear of hell, or more effectively, a more perfect repentance springing from the love of God,

restores him to his former state of purity. Virtues are in large part sentiments; vices, emotional habits deserving condemnation. The Christian religion is an essentially emotional religion, not only because it excites a considerable number of emotions, but because it does so consciously and knowingly.

This change in the emotional character of religions must be taken into account. It is very important for the history of legal philosophy. In a general way, legal systems influenced by dogma and ritualism are formalistic; on the other hand, those in which sentiment predominates are psychological and subjective. This is, however, only an approximate indication of their nature.

(2) *Secular Form.* Side by side with religious collective emotion, secular collective emotion is to be found in legal systems. It is difficult to say which of the two is the older. Presumably they have always coexisted. Whatever the fear with which primitive man regarded his deities, whatever the uncertainty of the masses before the juridical problems which suddenly presented themselves, it is undoubtedly true that the current of collective impulse which originally occurred in religions, occurred likewise upon other occasions. In the old criminal procedures, the crowd intervened to take possession of the criminal, even when it did not dare to pronounce judgment. Its rôle in judiciary and political assemblies increased for centuries before it entered upon the periods of decadence preceding our modern legal systems.

Patriotism is a collective and secular emotion, although in antiquity, it was based upon religion, and in our time depends upon personal reflection. For the ancient peoples were not patriots because they had national gods, but they had national gods because they were patriots. In our time, attachment to one's native soil and to the political unity of a country is justified by practical and

philosophical considerations; but patriotic ceremonies accompanied by hymns, processions, and music, affect the masses and even cultivated men more deeply than does a treatise upon the rôle and the utility of nations. Whether religious or secular, pure collective emotion produces an analogous form of morality; aversion towards acts publicly blamed and attraction towards those publicly admired. These personal impressions, agreeing as they do with those of the crowd, possess an authority which imposes itself upon every individual intelligence. They are easily believed to be general and absolute. To prove that they are accidental and relative is equivalent to depriving them of a great deal of their prestige. The famous argument of natural law which regards certain institutions as the essence of humanity, is the expression of this old morality, which nevertheless still rules us and can never be completely displaced. It has left quite distinct traces in our psychology; notably the fear of personal responsibility, which pre-supposes that the individual left to himself shrinks — and often rightly so — from taking an initiative which will not perhaps be in accord with the impressions of the crowd.

2: EMOTIONS OF SOCIAL SANCTION. Social sympathy preserves its entire effect only during assemblies and ceremonies where all the individuals vibrate in unison. When the group is dissolved, each goes his way and the impression is gradually effaced. The individual returns to his particular interests; and if his interests are opposed to the general interests, the remembrances of his past impressions would not perhaps suffice to maintain him in the right course. Man must have a social guardian who follows him into his private life and regulates his passions. By chance or instinct, religions and societies have had slight difficulty in discovering this guardian.

(1) *Pride and Shame*. It is the feeling of pride or of shame, of respect or of disrespect, which, even when they

are not openly expressed, makes the approbation or censure of public opinion, pleasant or painful to him.

This morality may be expressed thus: "If I steal and it becomes known, I shall be ashamed and shame is disagreeable"; or under its religious formula: "If I steal, God will know it and I shall be ashamed before Him." This last feeling is evidently more efficacious; it follows man wherever he goes as the eye followed Cain, but it presupposes sound religious convictions.

The secular formula is not a very reliable rule of conduct. It does not prevent the individual from doing what he wishes to do, when he is sure of not being seen. It does not forbid him to do wrong, but — as it is said — to allow himself to be caught. For rather small homogeneous, centralized groups, it is a sufficient moral force; it loses much of its efficacy among mixed peoples or those scattered over a large territory. Also, in periods of great prosperity or of decadence, social respect no longer suffices as a moral guide.

(2) *Position of Moralists on this Point.* Moralists have taken two different positions in regard to the feelings of pride and shame. Some have wished to destroy them in order to substitute a higher and a more complete and rational morality. "If you wish to succeed in matters of wisdom," said Epictetus, "do not resent at all being considered a fool or a madman with respect to external matters." The wiser and the more virtuous the person following this advice, the more violently will the authority of traditional morality be disturbed. By defying public opinion in order to do good, he made it less difficult to defy public opinion in order to do bad.

Others have attempted to transform the social sentiment into a subjective sentiment, to make of man the spectator and judge of his own acts, to make him when necessary play for himself alone the rôle of the public which acclaims or decries, and of the individual who is

acclaimed or decried. They have attempted to make morality rest upon a single basis: the esteem or lack of esteem which springs from the opinions of others or from one's own conscience. The emotion which emanates from "Achtung," from respect, or any other analogous emotion, may thus serve to render the abstract principles of duty living and efficient influences.

But these various systems are in certain respects very artificial. Social approbation and the approbation of one's conscience are in reality not analogous. They do not arouse emotions in the same organisms. Moreover, there are still many other moral codes which govern and have governed the conduct of civilized peoples.

3: EMOTIONS OF SOCIAL DIVERSION. (1) *Amusement through law and politics*. The desire to amuse oneself, the pleasure that one finds in a game, is an important factor in the formation of the law, for the law is, in certain respects, a plaything like any other. Man amuses himself with everything, — with life and with death; it is not at all surprising that he asks diversion of his juridical institutions. Between institutions, he chooses the most amusing; he changes them "for fun," and takes a dislike to them simply through ennui. Law and politics are the romance in which each plays a part to a greater or less extent, and which, all else failing, creates for everyone an interest in life.

I should never have dared, on my own private authority, to emit such a theory, if I had not found a sound application of it in an English theologian of the eighteenth century, William Paley, archdeacon of Carlisle, whose writings on moral and philosophical subjects are far from being suspected of misanthropy or paradox. He is absolutely without irony when he considers it one of the great virtues of parliamentary rule that it furnishes the greatest amusement to the greatest number of citizens. He is simply a spectator, but he does not regret

the tax-dues which he pays to the State and considers that he is largely remunerated by the narration of intrigues, parliamentary discussions, and revolutions.

They were given to him for his money; and, to be just, it must be recognized that, since that time, many parliaments have paid back in dramatic or grotesque emotions what they cost the public, and perhaps even the expenditures made by the State. The parliamentary régime is the most amusing. The simplest as well as the most subtle intellects find in it some means of entertainment. The former delight in the constant interruptions, fist fights, and insults; the latter, in the infinite variety of political manœuvres and combinations to rule others. The parliamentary form of government invaded the world because it was amusing and it will be effective in juridical elaboration as long as it continues to be amusing.

This is not, moreover, a fault, but a virtue. From all time, man has stood in great need of diversion. For centuries the church knew how to amuse the faithful by giving to each day of the year its special character; it knew how to divert him by the form of worship, the sermon, and the mysteries; and that was the time of its greatest power. It is by means of amusements, patron saint's day, exposures of criminals in ridiculous attitudes, and charivaris, that communities have intensified their autonomy and created for themselves a law and a collective morality. Diversion is at the base of every corporate organization. Wherever a rather intense juridical life has been produced, it is easy to point out the amusement by which the vigor of this life is maintained.

Decadent peoples are accused of interesting themselves in frivolities. Rome is reproached for its gladiators, Byzantium for its blue and green charioteers. To tell the truth, human psychology does not vary much in this respect. But, at certain periods, the crowd is inclined either of its own accord or through the political tactics

of those in control to seek its amusement outside of the juridical domain. Then it treats frivolous things seriously in order to rest from treating serious matters frivolously. The two systems, moreover, result in as much good as evil, and the historian guards against moralizing on this score.

Furthermore, emotions of social diversion are rather complex. The same institutions are not amusing in the same way in different ages. Pleasures may be coarser or more refined. The recreative element may affect legislative, judiciary or executive organs. It may be one with the foundation of the law itself or be applied only to the form. It deserves a special description for each moment of civilization.

One thing remains certain, that institutions are nearly always influenced by man's inclination to seek diversion and that this in itself is not an evil. Quite legitimately, the law has furnished, and will furnish for a long time, at least as much diversion as literature to the population of a country.

(2) *Imitation.* Imitation is likewise an emotion of social diversion. Properly speaking, imitation is a material fact which may have the most diverse psychological causes. Not the exaggerated importance accorded this factor in sociology as a whole, but the lack of analysis of this conception, was perhaps the greatest fault in Tarde's theory. A person may imitate for many reasons:—because after due reflection and consideration, he feels assured that he has before him a better model; or because although without any such conviction, he wishes to avoid personal responsibilities; or again, because through impulse, timidity or instinct, he does so almost unconsciously. It may also be emotional. This is the case when it constitutes not a thought, but a pleasure. The act of reproducing the gestures, the attitudes, and the sound of the voice of another or of seeing them reproduced, can give, apart from

any idea of utility, real satisfaction. A great many animals like to imitate; and it is one of the great pleasures of savages; thanks to this tendency children develop, and it is far from disappearing with the adult civilized man. To succeed in doing what one has seen others do gratifies one's "amour propre," and this is more particularly true when one recognizes — openly or not — the superiority of those imitated. (Take for example the negro who wears a high hat, or the countrywoman who goes to the town milliner.) Thus the prestige of civilization or of power has more influence upon the spread of institutions than has intellectual imitation.

In these instances there is really no specific feeling of imitation. Vanity explains the pleasure which one experienced in making oneself like another. To imitate for the sole pleasure of imitating, as does the monkey and the parrot, is also a human tendency. A successful imitation pleases us, even when it is not our own. Admiration of the talent of reproduction is the most common æsthetic emotion; it is one of the foundations of artistic psychology. Can it be found in juridical psychology? A politician, a magistrate, or a lawyer owes a part of his authority to the talent which allows him to imitate a particular social type. He is all the more admired when he is known to be different in his private life from the (public) character he represents. The pleasure of seeing good imitations maintains theatres and similar institutions and renders them dear to the people, without their suspecting the reason, while the pleasure of seeing mimicry, caricatures and cartoons is perhaps the most energetic revolutionary force.

But I believe that for any age whatever, it would be an exaggeration to base the idea of justice and of duty upon such a sentiment. Undoubtedly, the law of retaliation is an act of imitation. The judge imitates the culprit — knocks out a tooth if the offending party has knocked out

a tooth, puts out an eye if an eye has been put out. The debtor who pays his debt imitates the gesture of the creditor who paid him the money; he imitates him very closely, since in some legal systems the formalities of paying off one's debts are identical with those of contracting them. But it is certain that these various personages do not act thus for the pleasure of repeating the same gestures. They expect a precise result from an act which is not for them one of imitation, but rather of set-off. They wish, not to obtain two symmetrical acts for their personal satisfaction, but to annul one act by another, to destroy the like by the like. It would not be impossible, however, to discover, by descending a step in human logic, that the ultimate source of the idea of curing like by like is man's primordial tendency to imitation.

4. EMOTIONS OF SOCIAL CONTACT. (1) *Altruism*. "Love thy neighbor as thyself. Rejoice in his good fortune and help him to realize it. Suffer in his misfortune, go to his rescue." These precepts, which the spirit of Christianity repeats and has repeated indefinitely, express charity, altruistic moral emotion. According to the same conception, the idea of justice is thus formulated: "Do not unto others what you would not have them do unto you."

This morality and this altruistic justice demand the objectivation of a sentiment, that is to say, the act of putting oneself in imagination in another's place in order to divine his impressions. This operation is perhaps more difficult on its negative than on its positive side. To sympathize with others, it is necessary, in the first place, not to be absorbed in one's own affairs. If a person is no longer concerned with business, and has neither joy nor sorrow of his own to express, nor interest to defend, he is much more accessible to the woes of others. Altruistic morality and justice made their first appearance,

very probably, under an accidental, an occasional, form. It is those who have been unoccupied with sentiment that have performed through caprice the acts of generosity and of grandeur of soul which are classic in history. Primitive altruism is accidental.

It is equally individual. Certain beings by their physique, their race, and their conduct inspire only horror and scorn. Their adversary has no idea that there can be in respect to them either morality or justice. Others, more favored, excite sympathy or compassion. Christian charity presupposes, on the other hand, a minimum of justice and benevolence for every human being. The principles enunciated by the Gospel are not, however, those of sentimental universality. To say that one ought to love all men as one does oneself would be insanity, for hundreds of people suffer and die without preventing us from sleeping, while the least indisposition on our own part gives us a nightmare. To love all men as we do ourselves would be equivalent to immediate suicide.

It all becomes reduced to the question which Christ propounded to one of the doctors of law, — "Who is my neighbor?" From the parable of the good Samaritan it may be concluded that a neighbor is first of all any one who picks us up when we fall by the way, and inversely that we ought to be the neighbor of those who fall by the way over which we are traveling, and that in the one case as in the other, we ought to set aside every consideration of class and of race. The altruism of the Gospel is potentially universal, but not really so. We do not have to concern ourselves with those who travel over a way which is not ours.

But such has not been in history the most widespread theoretical interpretation. Many have maintained that we ought to love all men, which amounts to saying that we ought to love none of them but sacrifice

ourselves to all, a conclusion apt to revolt practical hearts as well as practical minds. This does not, however, prevent universal humanitarianism from having played a brilliant part in the development of civilization; but it is proper to distinguish it from humanitarianism with universal power, for their nature and their influence upon legislations are in direct opposition to one another. The first is no longer sentiment, it preserves only its literal formulas; it is especially powerful among peoples and classes in a state of decadence. It breaks up small groups for the benefit of broader and broader collectivities. It unifies the law and simplifies it, sometimes for better, sometimes for worse. It is apparently equalizing but often creates privileges in favor of the least interesting elements of a population. The second has entirely opposite characteristics, and counterbalances and regulates the first. It is based upon sentiments which are real and profound, and works through emotion, in the psychological meaning of the word. It is a very curious fact that the majority of reproaches cast by practical minds upon the influence of sentiment in laws are directed not against real sentiment, but against universal humanitarianism, which is at bottom only a theory.

The two altruisms possess, nevertheless, one and the same type of justice and morality, which is based upon the pleasure or the pain of others. This may be expressed in the following terms: "If I steal, I shall inflict upon another an injury which will cause him suffering, and the idea of another's suffering is painful to me." However, the last proposition is only fictitiously true in universal humanitarianism. The joy and sorrow of others no longer effectively react upon our organism. The person who gives food and clothes to a poor man, may rejoice directly in the pleasure which he affords; the one who gives a hundred francs to a work of charity knows only that his money will bring good to someone, but he has no

concrete representation of this good and therefore can experience no emotion from it.

This morality and this humanitarian justice, which appraises actions according to the pleasure or the pain produced, imposes itself to a certain extent upon everyone and is sufficient in daily practice for a great many highly moral people. Thus everybody admits that to rob a poor man is worse than to rob a rich man, a principle which is explicable by this particular system of morality, but by no other. Besides, this system is far from being always in accord with abstract morality; for according to it when the suffering caused is but slight, the act ceases to be blameworthy. It justifies the common but highly exceptionable maxim, that to rob a very wealthy person, or the State, is not to rob.

(2) *Jealousy*. While man has been living with his fellow-man, he has not learned merely to love him. There has also been developed in him a feeling over which the optimist very skilfully throws a veil, but which the serious historian and psychologist cannot ignore: i.e., jealousy. Animals are jealous of one another; dogs dispute among themselves for the bones which are thrown to them, and for their master's caresses. Some moralists would like to make us believe that man derives this evil tendency from his animal nature, that he loses it gradually as he becomes civilized, and will finally rid himself of it altogether. This is exactly the opposite of the truth. Animal jealousy is simple, rudimentary and accidental; in the human heart, it is complex, developed, and continual. It is only one of the colors which in juxtaposition with others, furnishes a picture of the real state of feeling in society; it is, however, so widespread, that its shades are found, darker or lighter, in nearly every human institution.

A man is more jealous than an animal, for the very good reason that he has many more things to be jealous of. He has to be jealous of everything he has, in order to de-

fend it, and of everything he has not, in order to try to acquire it. What he desires and cannot have leaves his heart full of bitterness. The things which he desires are infinite in number and variety: material and immaterial pursuits, objective realities and subjective impressions, good things and bad. Every time that he enriches himself in money, morality, or intelligence, he acquires new motives for regarding his neighbor with mistrust, and approaching him cautiously. There is no pleasure so pure nor ideal so disinterested that one does not try to appropriate it to oneself and dislike to see it appropriated by others. An ancient fable portrays the dog in the manger, who would neither eat the hay nor let the ox eat it. It is human jealousy that is attributed to this poor creature, a complex sentiment developed by social contact, in which the instinct of self-preservation no longer plays a part. In order to understand it better, three types may be distinguished:

(a) Jealousy, properly so-called, the fear of losing the goods to which we cling; distrustful aversion toward those who may take them away from us. (b) Mere envy, the desire to take from others what we ourselves do not possess. Finally (c), malevolent envy, the desire to destroy something of another's that makes him happy, without any personal advantage to ourselves.

To these three sentiments there correspond three social forces. Proud'hon said: "Democracy, that is envy." This proposition is incontestable, provided we add: "Aristocracy, that is jealousy." As for malevolent jealousy, it is the lot of abnormal persons and those who are unclassed, either because from a high position they have fallen low, or having started in the lower ranks they are slow in their ascent. Democracies arise as soon as one portion of the cake is a little larger for one class than for another; aristocracies — in the broadest meaning of which the word is capable — set a guard around their

situation as the old husband does around his young wife. Every newcomer is suspected by them of wishing to steal a part of their fortune or their prestige. Those who are victims of malevolent jealousy are more isolated, but their social action is more energetic. History abounds with such types. This grouping of classes by their bad sides does not, be it understood, authorize us to scorn any of them. We are simply pointing out one of their many psychological attributes.

Fortunately, this multiplicity of the occasions of jealousy has likewise its good side. Some depend upon others; they complement, oppose, or counterbalance one another. There is no human being however unrelated or closely associated with us with whom we are not in competition to a certain extent. Husband and wife, brothers and sisters, parents and children, are up to a certain point, opponents of one another. Each strives to play a certain part in the family life and is afraid of seeing himself effaced or deserted in consequence of the too great success of the one whom he loves most. As individuals, we may be jealous of our nearest relatives; as members of a family, of the neighboring family; as inhabitants of a town, of the inhabitants of another town; as citizens of a nation, of the citizens of other nations; as members of the white race, of the black and the yellow races. Thus, our psychology comprises an incalculable number of circles of jealousy of large radius and small. But according to the time, the institutions, and the political atmosphere, the outer, the middle or the inner circles, with a people or a class, are laden with hatred and distrust. The distribution of the passion of jealousy is never the same at any two moments of history; more than any other psychological or even any material element, it gives character to a civilization.

Jealousy is not an evil when it is not exaggerated, that is to say, when it is sufficiently distributed and not con-

centrated upon a single point. It is, perhaps, even a factor in life and progress, provided its circulation be regular. Likewise we must mistrust dreams of universal brotherhood which run a great risk of congesting the most intimate social organisms with all the malice which is driven from the extremities. Observe a philanthropist carefully and you will always discover the circle which bears the weight of his malice and ill-temper; for the best man is not perfect, and we may wonder if it would be perfect to be free from all jealousy.

In clinics of insane or of mentally deranged persons, partial studies of this emotion have been made. Amorous jealousy is one of the most frequent types; what appears as characteristic of this cerebral malady is not, perhaps, the intensity of the sentiment, for pathological jealousy does not always evince a violent desire to preserve what it loves, nor is it exaggerated suspicion, for the jealous person does not always reason badly; it is rather the concentration of the whole passion upon a single object. The fixed idea or rather the fixed emotion is the symptom and perhaps the agent of the cerebral injury, for the insane jealousy of the husband in regard to his wife is cured by separation, that is to say, by scattering his ideas or his emotions by new occupations. Social life has made us irritable, distrustful and sadly sensitive in regard to the success of others. Scattered, these feelings are easily overcome or remain inoffensive and even die out unrecognized by our own consciousness. Concentrated upon some one object they may lead to crime or insanity.

5: PURELY MORAL AND JURIDICAL EMOTIONS. The sight of good and evil, of justice and injustice, can arouse in us many and varied emotions, the chief of which we have just pointed out. Every one has his own ideas of morality and of justice. Religious or popular enthusiasm, shame before God or man, fear of ridicule, love of one's neighbor and the desire to spare him suffering, and

perhaps even the equilibrium of jealousies, form quite as many sentimental systems of morality and juridical philosophy. Although independent of one another by nature and logic, they are generally combined in practical life.

Does there exist a specific sentiment of justice and right which can be clearly distinguished from all those which we have hitherto enumerated? To divide the question, can such a sentiment be defined and its existence in the hearts of a certain number of human beings proved?

(1) *Justice. Different Kinds.* To love the just for the sake of the just, is to love not a principle, but an abstraction, that is to say, not a complete logical system and all the consequences which it involves, but a more or less vague form which comprises an agglomeration of the facts of concrete life. Can man love an abstraction? Certainly; for it represents a mass of indefinite things each of which may have an emotive character. Our mental generalizations and the resulting classifications are not of service solely in intellectual operations; the passions speak the abstract language fashioned by the intelligence. An insult places the detested being in the category of detested things; and praise, the admired being in the category of admired things. To feel that an act is good or bad, is to project the general and abstract emotion upon a particular object, is to make a deduction from emotion. In the most primitive stages of sentiments, an enemy is called a beast or a dog, — words that are more concrete but none the less abstractions and generalizations from odious impressions previously experienced. It is unpleasant to be called "dog," because among the characteristics of the dog there are those which are repugnant to man and from which he has received a painful impression. This impression is awakened by the insult, without its being necessary to reflect at length as to what is so disagreeable in the comparison of a man to an animal. Injustice is an emotional synthesis of the same nature. Personal experience

has given us this power of suffering and of revolt against everything that can awaken this abstract emotion which we recognize without remembering all the occasions upon which it has been aroused in us. We love the just for the sake of the just when we are made happy or unhappy by an act for the sole reason that it gratifies or offends the juridical synthesis of our existence.

As individuals and peoples have not the same experiences, the content of the sentiment of justice is essentially variable. One may condemn what another approves. Nevertheless, injustice has the same character for all — that of being a “revolting inequality.” The emotion of pure justice is therefore the enjoyment of harmony, of equality, of proportion; but history shows that the circumstances in which it may be experienced bear little resemblance to one another. As for human inequalities, some appear natural, necessary, and fortunate, others, cruel and revolting. Nobody in the world believes in absolute equality or inequality either theoretically or temperamentally, so that an infinite variety of combinations is possible.

In the juridical domain, however, three types of the sentiment of justice may be distinguished:

(a) There are peoples and individuals for whom the violation of a law is painful, no matter who its author and what its practical importance. The obligation to obey laws is a juridical equality of the first importance. The texts, indeed, may be much more favorable to some than to others, but the public spirit does not revolt against this inequality of treatment. There would be general indignation on the other hand, if anyone, however high his position, should be seen to scorn established institutions. Among such peoples, game will not be seen upon the menus of official banquets in the season when hunting is forbidden. This love of legality, this general and obligatory respect of law, rests upon a fundamental

conception of equality. We shall call it the sentiment of *legal justice*.

When English authors affirm that they are pained by every violation of the law, and rejoice in every proof of honor in this respect, and that this limits their conception of justice, we ought to limit ourselves to recording this special manifestation of juridical sentimentality without condemning, or approving it. Juridical sentiment properly so-called, that which affects the lawyer when he sees good or bad judging, is likewise attached to emotive legality.

(b) *Intralegal* justice is satisfied with finding equality in the law. Every privilege offends it; it rejoices in seeing all citizens submitted to the same provisions. But it is not concerned with what each can derive from the letter of the law; so much the better for the clever, so much the worse for the stupid. Accordingly, the latter are ruined by the same provisions which make the fortunes of others. There is nothing shocking in this, since they have only to do as those others do.

(c) Finally justice is *ultralegal* when it sees in the law an instrument by which to establish a certain measure of real equality among the citizens of a country. In order to institute equality through the law, this justice is very often compelled to suppress it *in* the law, and does it cold-bloodedly and without compunction.

It is not in our province to discuss whether one of these feelings of pure justice is higher than the others. All three reach far back in history and appear to have existed side by side. They do not represent in relation to one another improved forms of one and the same tendency. Every man, every people, every epoch may revolt against a violation of the law, an injustice in the law and an injustice through the law. But individuals, nations and generations are very unequally sensitive to these different types of inequity.

(2) *Differentiation Between the Sentiment and the Idea of Justice.* An affection, however, could not take the place of a mathematical theory. Those who most "hunger and thirst after justice" perform in the course of their lives acts which are contradictory to one another and cannot be justified by the same principle. Persons who believe that their logic and their passions are perfectly and definitively united are dangerous. Dangerous, but excusable, and all the more excusable since almost no philosopher of the law warns them of the radical, essential and eternal differences which separate the most perfect sentiment of justice from the idea of justice.

The latter is complete and systematic, the former, incomplete and irrational. The one is always at our disposal; the other, only accidentally so. The general principles of law can, up to a certain point, be formulated in books where they may be sought at need. We cannot so easily question our enthusiasm or our indignation in order to decide in favor of a litigant and against his adversary. It is very nice to be able sometimes in the course of one's lifetime, to devote one's whole strength to an abstract idea, to give oneself soul and body to a cause from which one has nothing to gain or to lose. But this does not begin afresh regularly every day; that is physiologically impossible. A slight injustice may excite us at one moment; at another, when our nervous system is exhausted, a much greater injustice will leave us quite unmoved. With our principles well in hand, we can, on the other hand, indefinitely and at any time, appraise each act at its respective value.

There is a sentiment of justice as soon as the injury to the abstract conception which each may have of it becomes painful, whatever the nature of this conception. There can be no other criterion. No human being is regularly affected by what is logically unjust. The cases where we react or remain unmoved are

governed by chance and cannot be of any theoretical value to us.

(3) *Pure Justice not Necessarily Disinterested.* Neither need we believe that the sentiment of pure justice is necessarily disinterested. In reality, we rebel against a wrong when it affects our interests, much more energetically than when the interests of others are involved. There is, to be sure, no merit in groaning over a personal wrong. But it is not a question of merit; we are only trying to appraise objectively a stage of emotional development. Without intending either to flatter or disparage him, the man of the present day of average moral worth is capable of pure juridical emotions, but he nearly always experiences them when it is a question of his own interest. He is seen to prosecute good, bad, and indifferent lawsuits. If he loses them, his indignation will not be solely proportionate to the loss sustained. This is the case when he recognizes deep down in his being that it was right for the decision to be against him; in the doubtful cases, he approves with his whole heart all the provisions and interpretations which are favorable to him, and he approves them sincerely, not only in his own interest alone, but for all others; it is much more difficult for him to experience that part of equity contained in the arguments of his adversary. As long as he believes rightly or wrongly that were he in his adversary's place he would not contest the right which he claims, his morality remains irreproachable, even if his intelligence is at fault. Finally, if the injustice toward him is flagrant, he rebels with a very particular violence, a good part of which must be attributed to the fact that he is clearly conscious that principles have been violated.

Jhering has proved very satisfactorily that there is something else besides self-interest in the Struggle for Rights. He is wrong perhaps in attempting to trace this excess of moral excitation to a reaction against a personal

offence. To demand from us more than we owe, to put us in the wrong when we are right, is a way of despising us. It is understood that in order to wipe out this affront we entered into a legal contest, the pecuniary interest of which is only the objective, not the motive. Thus interpreted, the Struggle for Rights would always be a simple question of often wrongly placed vanity and would have but little psychological interest. In reality, there are cases of injustice which cannot be interpreted as offences but are none the less revolting. I wish to enter upon a lawsuit, believing myself a thousand times in the right, but my lawyer assures me that judicial decision is against me and induces me to abandon my intention. There is nothing in that which could offend my self-respect; and yet I might be indignant at this judicial decision and consider it hateful and unjust. Besides, the average modern man is capable of feeling that it is wrong to violate the rights of others, even to his own advantage. The most dishonest people experience a certain uneasiness in doing wrong. But their joy at the benefit derived dissipates this impression and consoles them for the violation of their ideal.

To tell the truth, the sentiment of justice is in itself always impersonal and disinterested, but it is increased or diminished by personal and selfish sentiments. Above all else we are bound to defend ourselves and those we love. To concentrate our attention upon claiming our right is an obligation, almost a duty; for if we do not do it, nobody will do it for us. Certain juridical principles presuppose that everyone possesses sufficient initiative to demand his due. Thus, in many procedures, the judge can grant no more than has been claimed. A person can scarcely be sufficiently discerning to calculate exactly what he ought to demand. He claims the most in order to have the least, and if he obtains the most he keeps it without compunction. As for the affairs of

others, save in exceptional cases, one ought not on principle to concern oneself with them. There are more disadvantages than advantages in introducing public sentiment into private affairs. Thus in modern societies, occasions in which we are sensible of the just and unjust as regards ourselves are more numerous than those upon which we experience the sentiment in regard to others.

From the psychological point of view, emotional equity always remains identical with itself. Since the earliest ages, it has made its appearance under the form of an abstract affection; it may have such a form among the lowest type of men, otherwise wrongs would not give offence. From the moral and utilitarian point of view, it assumes its true grandeur and its social importance only when it becomes capable of subduing every other sentiment, of compelling the individual to act voluntarily against his own interests rather than offend his ideal. He who claims a hundred thousand francs because he has the right to them, may be the same as he who gives them up because he had not the right to keep them. We admire him in the second rôle but not in the first. The psychological cause of the two acts may be identically the same. May we not believe that justice should preserve its first function in order to develop its second, which is unquestionably the noblest and most beneficent?

6: IDEAL POLITICAL AND UTILITARIAN SENTIMENTS. Will the man of tomorrow have a purer, most disinterested sentiment of justice, and one more in conformity with principles than the man of today? In regard to tomorrow of uncertain date, when "the king, the donkey and myself" will very certainly all three be dead, one takes no great risk in prophesying. I shall refrain from doing so nevertheless; for in my opinion, the future of the sentiment of abstract justice is something contingent and cannot be calculated at the present time.

(1) *Ideal Utilitarianism.* From the fact that moralists are studying it very closely in its psychological nature, its metaphysical justification and its practical applications, from the fact that as a result of this study, a greater number of benefits are enjoyed by a greater number of individuals, pure equity ought very certainly to become more active in human psychology. It would become so but for its irreconcilable enemy, the utilitarian ideal, which destroys in a short time the work of several centuries and compels the practical application of justice to travel indefinitely in the same vicious circle.

Ideal utilitarianism is encountered among individuals and nations of the highest moral worth and among personalities who yield nothing to Aristides as benefactors of humanity. It would be difficult to condemn this sentiment absolutely; besides, such condemnation would be useless. But in order to understand history aright it must be pointed out that these two most noble and respected social sentiments have always been hostile to each other and always will be.

If all the people in the world could, on the same day and at the same hour, attain the same moral stature, and the next day progress one degree, and so on, there would be nothing to prevent the speedy arrival of the absolute reign of justice. Unfortunately reality brings together at the same time and sometimes at the same place beings who are unequal intellectually and emotionally. The best are by definition the most just, but can they remain so? Their noblest function is to raise backward humanity to their own level, to set themselves up as an example, to protect their ideals; that is to say, to protect themselves, to put themselves in the foreground, for if they should disappear or remain in obscurity, their ideal would share their lot and the world would become the worse for their defeat. It is their duty to triumph, because the justice which is in them will triumph in their triumph. But in

order to conquer and maintain their position, every weapon, even the least commendable, must be used, and the victory which monopolizes to the advantage of a few the sole direction of destiny is not a just victory. Justice consists in allowing each his place in the sun and the right to develop himself by his own efforts. Now the triumph of their betters despoils the others of this right. Consequently, the just man who triumphs is no longer a just man. He has compromised his ideal which he wished to safeguard. This is why the *mot* which a French deputy hurled into the uproar of an excited session, "In politics there is no justice," is a principle whose truth is undeniable.

And we are speaking of politics in the highest meaning of the word, the pursuit of a future of moral grandeur and material prosperity for the benefit of all. When it is a question of international, national, world or home politics, the politician of the highest order is compelled to lower his ideal in order to save it, to be cruelly inflexible in the name of humanity, to arrest men in the name of liberty and regularly to commit wrongs in the name of justice. He is obliged to be utilitarian and at the same time idealistic, that is, to understand the practical means of realizing his ideals; and these practical means are far from always being entirely honorable.

A thorough and wholly impartial study has recently been made of the imperialistic sentiment which is manifested at the present time in the most prosperous countries. It originated in the writings and the speeches of the most illustrious champions of imperialism, Chamberlain, Roosevelt, and Kipling. It is impossible to be mistaken concerning the thought and the logic of their system. They do not believe that all peoples, even those equally civilized, are destined to take part on the same footing in the development of civilization. They think that certain races and certain nations — their race and

their nation — ought to have a preponderating influence morally and commercially. They desire universal domination for their country. They do not desire it simply through national selfishness in order to enrich themselves and their fellow countrymen, but through love of the superiority which they represent and by means of which they wish to benefit humanity as a whole. In their opinion it is their duty to triumph, to absorb into their own the destiny of mankind. The mission is a brilliant one, but it will not succeed without renunciation, sacrifice, and arduous toil upon the part of the directing people.

Since they are obliged to be stern toward themselves, we must understand that sentimental imperialists do not propose to be very gentle toward others. They will know how to fulfill their duty with humanity, but without weakness. We are acquainted with the course to which this formula corresponds in all practical questions. It is proper in the first place to be merciless toward those who may chance to cross their path: it is equally impossible to listen to the demands of inferior peoples who claim to have the right to govern themselves and to stagnate in their poverty, their vice or their ignorance. It is to their own interest that they should be helped a little.

These sentiments are often very sincere and very creditable in those who hold them. But are they not at the very antipodes of sentiments of abstract justice, and already very far removed from the pure altruistic emotion which makes us share the grief of another and be compassionate toward him so far as possible?

If such doctrines expressed a whim of the theorist, or a fit of pride on the part of peoples intoxicated by prosperity, or a political manœuvre of statesmen in pursuance of a selfish aim, their philosophical importance would not be great. One may wonder at this entire frankness in the expression of ideas that are embarrassing to enunciate before the international public, and at the absolutism of

this imperialistic sentiment which so completely invades the consciousness of certain groups; but one cannot deny that ideal utilitarianism is also at work to a certain extent among those who do not acknowledge it or do not believe that they are obsessed by it. In fact, it must be remarked that this leaning toward injustice on the part of the most generous souls because they are generous is seen quite as often in the sentimentality of home as of national politics. To the prince who sought the prosperity of his dominions, Machiavelli advised the habitual use of murder and treachery. In internal politics of all times, and — to varying degrees — in all countries, the victorious party is authorized by the fact that it is the best to commit, in regard to the conquered, necessary wrongs. They all attempt to render their conduct legitimate by the same argument. "Our duty, our only duty, is to triumph by all means, not in our personal interest, but for the idea which we represent and for the future of humanity." It is entirely needless to give examples. The most mediocre historian can, unaided, choose among the lot.

(2) *Result of Struggle Between Emotive Justice and Ideal Utilitarianism.* What is the result of this struggle between emotive justice and utilitarian sentimentality, as related to historical progress? The masses learn, by experience and from the teachings of jurists and philosophers, to recognize even in detail what ought to accrue to both. They are pleased to see the application of rules that are dear to them. They love justice as if it were a person in flesh and blood; when its decrees are not obeyed, they feel that it has been outraged and they are indignant. But some fine day, one of life's chances brings them face to face with groups of a lower class whose ideal is coarser. What would become of their goddess in such hands? In order to save her, they do not hesitate to sacrifice their ideals of order, tolerance, and equity, —

every moral abstraction so painfully acquired. They hope, however, that the era of injustice is only temporary and that they will soon be able to resume their interrupted worship. It is impossible to affirm that they are right or wrong.

Judged by its results, utilitarianism will be good or bad according to circumstances: it may end in barren loss or in moral gain. The superiority of the people or of the party which wishes to govern at any price, may be only apparent; it may be incontestable but partial — the Americans are unquestionably superior to the continental nations with regard to certain traits of character, unquestionably inferior with regard to certain others, — it may be general, but to a limited extent. In these three cases, the one that triumphs by unjust means is not in a position to restore the equivalent of what it has destroyed. Sometimes mankind is definitely weakened by the victory.

It may happen, on the other hand, that the ideal to be preserved is of such value that even when imposed by force against the law, it effects progress. The superiority of a people or a party may be so great that its disappearance would be the greatest misfortune to humanity. Perhaps there are people whose rule it would be well to buy even at the price of the sentiments of equity and liberty. These valuable abstractions cannot be of as much benefit to us as the guidance of certain thinkers. If every one knew how to appraise himself at his just value, imperialism, reasons of State, political tyranny, and every form of ideal utilitarianism would be salutary. Unfortunately, since every one, with the best faith in the world, estimates his own worth to be greater than it is, exaggerates his own superiority and the inferiority of his neighbor, and attaches undue importance to his own ideas, the sentiment which impels us to try and make the world better, is more harmful than otherwise. But since there are no

means of suppressing it, and since it is manifested among the highest types of mankind, it must be admitted that the human ideal of justice is far from having before it a smooth, clear road. If it possesses the strength to make the journey, it has a dangerous traveling companion, who will do it a good or a bad turn according to circumstances. And since we do not understand these circumstances, and since nobody understands them, we shall refrain from speaking of the justice of tomorrow.

§ 3. *Influence of Sentiment upon the Law.* Thus sentiment enters into the law from every direction. Is this for better or for worse? Would logic be of more value if it were never a passion, but a syllogism whose development would be regular and mechanical? Can we conceive of a law which would consist solely of reason and logic? Of those who concern themselves with legislation and establish plans for reforms, we term some sentimentalists, others, men of dry and positive minds. Have these words any meaning in our subject?

1: CONFLICT BETWEEN THE PRACTICAL AND THE SENTIMENTAL. (1) *Opposition as Regards Juridical Aim.* In the determination of the juridical aim, the rôle of sentiment seems important and necessary; apparently nothing could take its place. If we are entirely indifferent to the past and the future, it is quite useless for us to make laws. We must know what pleases us before we can seek the means of realizing it. Juridical aims are all of sentimental origin. But they are not entirely sentimental. One may propose to himself to satisfy an affection or to realize an ideal through the law. The ideal was a sentiment, but it is so no longer; it is an extinct sentiment. It has become an idea, a principle, and belongs to the intellectual life. "No being should be punished for another's fault," is a formula of emotional origin, but it can be treated like any geometric axiom. The ideal may not be approved by the one whose activity effects its triumph.

Thus the judge and lawyer ought, in my opinion, to seek the juridical aims contained in the texts without evaluating them. Even the legislator may admit ideals which do not appear to him very exalted. Of those who established divorce, many do not care to have recourse to it themselves. In the making of laws and the practice of law, certain minds prefer to be guided by sentiment, others by ideals, which are precise formulas exempt from the vices of emotional logic.

(2) *Opposition as Regards Degree of Immediacy of Cause.* The two temperaments are further revealed by other tendencies. There is not a text of law which has not a sentimental cause, but this cause may be more or less immediate. The extremely sentimental individual holds that the text is the direct revelation of what he feels, and he is solaced by its very expressions for the injustice which he encounters in life. He risks compromising the future of those he loves by these immoderate manifestations of his sentiment.

Illegitimate children are born through a fault not theirs. Is it just that they should suffer from it? We are tempted to cry out, with Alexander Dumas, shame and malediction upon those who wish to hold them accountable for their original blemish. Therefore, we think that in their fathers' succession they should be given a share equal to what they would have had if they had been legitimate. But if we do this and make a law entirely in their favor, perhaps many illegitimate fathers will hesitate before a recognition which would seriously involve their future, and some bastard who would have been recognized under a sterner law will not be under a milder one. We shall have expressed in the law very humane intentions; we have, in reality, inflicted an injury upon those we wished to favor.

The sentimental jurist of the latter category may be characterized as follows. He wishes above all else to un-

bosom himself. The law is the exercise by which he soothes his nerves and to it his heart entrusts all its tender sentiments. But he often does more harm than good to the interests which he tries to serve.

More cultivated persons make better calculations. They know how to restrain their emotional reactions and to choose the most favorable means of satisfying them. Daudet's Pope's mule calculated its kick for seven years. The practical man imitates the mule in this respect. Reflection holds back, until the opportune moment, what emotion would like to bring nearer, so that the sentimental aim of the law may be situated very close to the text or very far from it.

In the matter of consent of parents to the marriage of their children, is it best to be strict or lenient? Some readers will be more particularly interested in the end of the novel, in which there is opposition to the lovers by the parents who look unfavorably upon the union; another will be less concerned with the immediate trials of the hero and heroine. He will ask himself, "For this marriage to be permanent and happy, is the influence of the parents good or bad?" Others still will overlook the individual happiness. The constitution of the family is important for the prosperity of a nation, and it is this feature in which they are interested.

What nations are the most prosperous, those in which children marry as they like or those in which they remain a long time under the authority of their parents? The prosperity of a nation is a sentimental aim, for it can have no interest except in the pleasure it procures for individuals; but this is a sentimental aim far removed from the legislative measure under discussion. Whatever, therefore, be the legal text, there exists, or can exist, a series of sentiments, "S, S', S'' . . . Sⁿ," which are capable of being related to it. Necessarily we have recourse to one or the other; but we cannot make a serious

study of legislation or of juridical interpretation without pointing out the exact situation of the sentiment which is or has been chosen.

Among human minds, some almost always choose the nearest sentimental object, "S," and are termed sentimentalists; others, the farthest, "S",," and are termed positivists.

Those who are most often guided by the nearest emotion are generally the inexperienced, for whom life still holds many illusions. They may do a great deal of harm, while trying to do a little good. The positivists are not free from all reproach. It is their lot to sacrifice a more immediate human benefit for an abstraction that is not always of great value. A prince, the disciple of Machiavelli, had brought about, through assassinations, a number of unquestionable evils; as a result the dignity and prosperity of his country which were his true desire had been greatly diminished. Under the skin of the utilitarian there often dwells the visionary. Economic prosperity, military superiority, scientific prestige, or social progress — any one of which is a great deal but not everything in life — seems to him the sole, the indisputable aim of humanity. They are a little like the middleman who said that when the ship goes, everything goes.

(3) *Opposition as Regards Minimum Sentimental Type.* Finally, the practical and the sentimental man are opposed in the making of the laws and in juridical interpretation from a third point of view. In law, as in legislation, there often arises the necessity of inventing a minimum sentimental type, an imaginary person whom it is still desirable to admit in the law, but beneath whom there is no one that is worthy of legal protection. The choice of this person is purely arbitrary. A being possessed of refinement and morality or a mere brute may be chosen. We can be guided by no rational principle. There exists in real sentimentality an extraordinary va-

riety of gradations; there is no reason for our stopping at one scale of the ladder rather than at another.

Ought, for example, insanity to be a ground for divorce? He who hurries his wife who has become insane from childbirth into an asylum and marries again does not exhibit very refined feelings. The woman who would act the same towards her husband who had become mentally deranged through overwork in trying to increase their common prosperity, would never again excite our admiration. Cujas had an entirely different way of interpreting the celebrated "*Nunc ipsa pericula jungunt.*" He would compel the husband or the wife of a leper to brave contagion in order to continue the conjugal life in its full intimacy. "For better, for worse," was a juridical duty which he interpreted after a very exalted but perhaps a rather stern fashion.

So complete a spirit of self-sacrifice is not obligatory upon everyone. There are many more practical persons who do not care to bring so much of the ideal into their lives. Can anybody force them to do it? It is more liberal to allow everyone his sentimental liberty, but it cannot be done. The practical individual who finds it to his advantage to get rid of a husband or wife who has become mentally unbalanced will be outstripped by another more practical still, who will grow tired of a sick husband or wife when the malady is incurable, or when it threatens too long a duration, or even if it is only temporary. We might cite people, possessed of slight sensibility but not devoid of morality, with whom it is the custom, when one of the two is ill, for the other to go off in search of amusement, not returning until after the sufferer recovers. There are cases of those who are still less sentimental, those who think it very strange that any attempt should be made to bind them to any obligations of fidelity or helpfulness which are not in accordance with their temperament. So that however low we descend in the social

scale, society, respectable and unrespectable, always presents to us a picture of the sentimentally superior being trying to impose his rules upon one sentimentally inferior, while the latter complains of the oppression.

As there can be no logical reason for the choice of the higher or the lower rule of conduct, the positivistic temperament reduces the demand of the law to its minimum, while the sentimental would have a tendency to find in it the expression of a more refined type of morality.

2: LEGISLATIVE AND JURIDICAL LABOR SENTIMENTAL IN FORM AS WELL AS IN SUBSTANCE. In the study of law, no one can neglect the emotional life. Lawyers and legislators, the highest visionaries and the most debased sensualists, differ only in the quality of the elements which they handle and not in their nature. Without sentiment, substance would nearly always be lacking. Must we say in company with many eminent legal philosophers that sentiment is the substance and juridical science the form of laws? I do not think so; the emotional life is quite as much the form as the substance of the law.

That appears, at first glance, incontestable as far as legislation is concerned. Passions are the materials. The legislator finds himself in the presence of a crowd which manifests moral or material appetites; he must examine their legitimacy and the means of satisfying them. But the legislator is at the same time the crowd or its representative, and we have seen what a series of social emotions he normally experiences. The object of the legislative mechanism is no doubt to submit the idea which takes hold of the nerves to the control of the idea which is in the brain. It is the control of Philip drunk by Philip sober. But this control is made under the lash of new emotions, and it is very difficult for it to be absolutely objective.

The work of the legislator and of the philosopher is to transform emotional ideas into ideals or principles which

can act through their logical force and be protected from contrary impulses. They do this to a certain extent, but never completely.

Much is said concerning the great principles by which we are governed; it would be more correct to say, the great sentiments. One of these, for example, has been particularly studied and applied, and to it we are indebted for the majority of the changes of the nineteenth century. This is the sentiment of liberty.

Liberty is a sentiment and a principle. Now a principle and a sentiment are opposed to each other, and in spite of the praiseworthy efforts that have been made in this direction, the two have never been able to coalesce. And yet the labor of liberalism is perhaps the most admirable thing in the nineteenth century. From high to low in the intellectual scale, from the philosopher to the practical man, there has been an attempt to develop the content of the idea of freedom. It has been studied in its justification and in its abstract extension, and classified according to its principal applications.

Political, economic, religious, intellectual and moral liberty have been differentiated. It has been treated by every method of formal or experimental logic, without resulting in the possibility of robbing it of the emotional character which has belonged to it from the beginning. We are subjected to suffering and tyranny when any one tries to force us to do something that is disagreeable to us or when we are prevented from doing what gives us pleasure. Our sentiment again revolts whenever one person tries to impose upon another restraint in regard to these same acts. "Do not permit to be done unto others what you would not wish to be done unto you," says the sentiment of freedom. The logic of freedom would say quite differently, "Do not do unto others what they would not wish done unto them." Rationally, one has to assume the psychological point of view of another

in order to know in what instance one may allow that other to act on his own initiative. This is sometimes done but not always. The majority of people are accustomed to remain entirely independent in certain acts of their lives; the least restriction that the law might impose in this respect would appear inadmissible to them. As regards other acts, liberty is measured out to them very strictly without their being conscious of the fact. In traveling in different countries, it is seldom that one does not encounter certain provisions which appear annoying to no purpose; one wonders how free men can submit to such tyranny. With a little more reflection, it is perceived that liberty is everywhere a relative thing, because it is everywhere a sentimental thing. People come into mutual collision over sentiments which they call by the same name because the content of these sentiments is concrete, and sentimental logic is very different from formal logic.

A lawyer in a free country is said to have defined liberty as the obligation to obey the law. Such a paradox is explained by the fact that he consulted his impressions and not his reason. Obedience to the law not having been troublesome to him, he could not conceive emotionally that it could ever be tyrannical. The majority of those who contribute directly or indirectly to the making of laws judge according to their emotional experience; and consequently legislative labor is sentimental in its form as well as in its substance.

Juridical labor is equally so. The interpreter of the text ought not to allow his personal impressions to pass into his work; but he is obliged to respect the psychological character of the legislator. If the latter has fashioned a work of passion, he cannot make it a work of cold justice. He shares neither the hatreds, nor the affections of political parties, and makes them as slight as possible, but if they are clearly expressed in the law, he cannot say that

they are not there. Suppose that a legislator makes of certain legal provisions a weapon of warfare and revenge against a certain class of citizens; the interpreter ought to say to the individuals concerned, "You were treated thus because you were hated." For if he says anything else and attempts to present the law as a work of impartial philosophy, he does not pacify those who are particularly affected, but destroys principles and subverts juridical logic to boot. In fact, judges and lawyers do a little one way, a little the other. They treat political passion both as sentiment and as reason. It is difficult to give examples here, not that they are rare, but because they touch a little too closely on practical politics, from which we always prefer to keep at a distance.

The danger for juridical science is not in the presence of sentiment in the law, but in the skill with which it conceals itself. As long as it is hidden, one cannot know whether it is to be commended or condemned. For the historian-jurist to make no attempt to penetrate into the emotional life of a people is to avow his impotence to understand the progress of the law.

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CHAPTER VIII

LAW AND THE INTELLECTUAL LIFE

§ 1. INTRODUCTION.—§ 2. LOGIC AND SENTIMENT.—§ 3. DIFFERENT FORMS OF THE INTELLECTUAL.

§ 1. *Introduction.* When, several years ago, my eminent master, Meynial, proposed the *Problem of the Rôle of Logic in the Scientific Formation of the Law*, one could but wonder how so important a question had remained so completely hidden from jurists and philosophers. Jurists and philosophers were in light-hearted ignorance of one another. No doubt well-informed lawyers, magistrates, and professors of law kept in touch with the great movements of philosophy — in order to be able to talk about them when the occasion demanded. This was the case in France, and pretty much so in Germany. A witty colleague, formerly of our University, compared the legal philosophers of Germany to *Sonntagsreiter*.¹ As for professional philosophers, they completely ignored the jurist. Legal science was a matter of conversation only among men of the legal profession.

Thus it was that such a simple question as “What place has Logic in the Creation of Law?” stated in an objective fashion (as an investigation into a psychological reality aside from any question of value), was a perhaps surprising novelty, for it stated a true problem of legal philosophy and one which had not then, nor has yet, been exploited.

If the conclusions reached by the eminent professor are

¹[One who hires a horse only for Sundays to make his appearance in the fashionable parade.]

far from being mine, still the mechanism of juridical logic was analyzed in part with inimitable clarity and finesse. He proved that logic is not wholly in the law, that it is rather an instrument, and that the principal matter of law is sentiment.

In the opinion of jurists of the old schools, the legislator, the judge, and the theorist ought to be guided by reason at every step. A law made without the light of reason and under the rule of the passions, would therefore be said to be a poor law, — one contrary to true law. This was a profound illusion from which we have entirely awakened. From all time, passion and sentiment have had their say. No law which was completely estranged from the life of the emotions could have existed. It is an established fact, and one which is gaining greater prominence every day, that during the whole course of the nineteenth century the various philosophical movements reduced farther and farther the rôle of conscious, individual, logical thought to the advantage of sentiment, of collective thought, or even of such rather vague entities as “popular genius,” “conscience of the people,” “customs and general tendencies of the nation,” “creative force of the people,” etc. While intending to explain everything, these formulas really explain nothing and elude all analysis, a quality which to some is a proof of superiority, but to me seems only a proof of intellectual laziness.

We are going to resume our analytical labor by attempting to fix the relations between the emotional and the intellectual life in the formation of the law.

§ 2. *Logic and Sentiment.* Between emotion and sentiment we have made a distinction which seems to us both an essential and a happy one. Sentiment is a capacity for emotions which may or may not become realized. If we love anyone we are inclined to rejoice in his happiness and grieve at his unhappiness. But if nothing very fortunate

or unfortunate befalls him, we may for a long time not experience any emotion in regard to him. Sentiments are extinct volcanoes which it is a mistake to consider in continual eruption. Now if emotions act directly and disturb the logical faculty, if the emotions have their own logic which is not rational logic, this is not the case with sentiments which have no existence in themselves and could not act if intelligence did not create for them an existence which is fictitious and yet essentially rational.

It is an incontestable fact that it is impossible to foresee how a misfortune will affect any particular individual. A certain person may receive bad news with indifference and yet will be overcome later by crises of despair which will swell and subside at the least incident. Grief may be very acute and short-lived, or very long and less deep. We say of a widow who marries again a short time after the death of her first husband that she did not love him, a statement which may be absolutely false. The world of the emotions is entirely foreign to the reason and does not lend itself to any logical deduction. But this incoherence of the emotions is not conducive to self-satisfaction. We hide it even from our own thoughts and try to feel what it is reasonable that we should feel under any particular circumstances. "He was my friend and I ought to be grieved at his death." A very intimate friend ought to be mourned more than another who is less intimate; a near relative more than a distant one; someone who has been kind to us ought to be regretted more deeply than a selfish person. So the world of sentiment is in reality a very logical construction to which all the processes of discussion are applied and are applicable. Thus H. Poincaré could write: "From the moment that we base our syllogisms upon one of those generous sentiments which beget morality, it is this sentiment, and consequently morality, which we must encounter again at the end of every chain of our reasoning,

if it has been conducted in conformity with the rules of logic.”¹

This would not be a correct observation if sentiment did not become transformed into intellectual matter.

Now, there may intervene in the juridical domain, but under very different circumstances, irrational, emotional logic, and rational, sentimental logic. Of the first we have already spoken; to it we must attribute occasional laws: thus we assign to emotion, arising from a father's assassination by his son, the Macedonian *senatus-consultum*. Rational sentimental logic makes of love, friendship, hate, pity, etc., veritable intellectual creations, to which we may apply, in turn, formal, legislative, juridical logic. Now it is nearly always this intellectual conception of emotion which constitutes juridical matter, so that the rôle of affectional phenomena in the creation and formation of the law is considerably reduced thereby.

Thus, when the law-maker determines what ought to be the normal relations of the affection between husband and wife, what sacrifices one ought to make for one's children, and what is the order of the preference of the deceased, etc., he performs a work which is purely logical, in spite of its emotional appearance.

§ 3. *Different Forms of the Intellectual*. “Emotional and intellectual,” and “logical and illogical,” form two methods of classification of all human psychology. But the two classifications are not identical and whoever adopts one should renounce the other. To set in opposition to each other “logic” and “sentiment,” and “illogical” and “intellectual,” is a gross error which we must charge against many works of widely varying character; even some which make a strong point of method.

Let us guard carefully against this mistake. There is a great deal of logic in the most refined sentimentality, but especially and above all, there is a great deal of the

¹ *Dernières Pensées*, p. 240.

illogical in works of the intellect. Every wrong calculation is none the less a calculation, all false reasoning is none the less reasoning. A confirmed misanthrope who saw only the evil in the sentimental and intellectual aspects of humanity asserted that "Man is more stupid than wicked." For my part, I am fully convinced that the most terrible human dramas have been above all else gross errors of logic. But to call irrational logic stupidity would be a deep injustice. The domain of the irrational intellectual is immense. It imposes itself on everybody; and certain regions of it can be reached only by a high order of mentality.

What is there of the strictly logical in the law? Only its scientific aspect, the employment of methods which have been proved in the mathematical and physical sciences; e.g., deduction, induction, observation, classification, analysis, and synthesis. The "*raison d'être*" of the law is the realization of economic and moral ends in accordance with the idea of justice. Such a realization may be pursued scientifically, but the choice of economic and moral ends cannot be scientific. We shall call these intellectual operations, which without being scientific are indispensable, investigations into natural law. It is a part of ethics. These moral and economic ends must be ordered in accordance with the idea of justice. This ideal of justice cannot be determined scientifically. The only thing which can reveal it to us is a very difficult and abstract discipline, one which demands the greatest intellectual effort, viz., metaphysics.

A large portion of the intellectual operations necessary to the construction of the law are not scientific. We need not blush at this fact. There is nothing so to be ashamed of in using ethics and metaphysics, if only we know that we are doing it. We need not believe a word of those who claim to have found a scientific and objective idea of morality and of justice. Those who would despise the

law for this reason would be blind indeed, for it is impossible to deal with humanity in any capacity whatever without engaging in ethics and metaphysics.

Investigations into natural and metaphysical rights must be conducted according to precise rules. We may employ therein all the principles of logic; we may make mistakes, discuss and correct them. In such investigations, all the faculties may be exercised. . They are rational without being scientific.

Therefore if the formation of the law cannot be effected upon a scientific basis, it might be upon a rational one. But it is not so in fact. The law contains a great deal of what is intellectually irrational, for the very simple reason that the law is not made by and for people who know how to reason perfectly. Every one goes as far as he can in the path of logic; sometimes this is not very far. This is an inevitable and incontestable fact. Not to take it into account would be to try and close one's eyes to the truth. Man may be deceived through passion and self-interest. But he may also be deceived through mental weakness. The masses cannot get very far into the domain of the abstract without going astray. In order to be always intellectual, its psychology will often be entirely irrational. Moreover, the study of this irrational intellectuality is very interesting. We shall be guided in this study by very profound and positive minds, although we may not reach identically the same conclusions as any of them.

CHAPTER IX

THE DISEASES OF LEGAL THINKING

§ 1. GENERAL CHARACTERISTICS OF DISEASES OF THINKING.—
§ 2. PRINCIPAL TYPES: (I) CREDULITY; (II) LANGUAGE MYTHS;
(III) HISTORICAL MYTHS; (IV) FASHION.—§ 3. DISEASES OF THOUGHT
AND LEGAL DEVELOPMENT: (I) THE MYTH AS A FACTOR IN EN-
ERGY; (II) MYTHICAL PRINCIPLES; (III) THEIR DIFFERENT AS-
PECTS.—§ 4. THE MYTH AND LEGAL FICTIONS: (I) THE RATIONAL
ELEMENT IN A FICTION; (II) MYTHICAL TERMS AND EXPRESSIONS
IN LAW.

§ 1. *General Characteristics of Diseases of Thinking.*
Very little observation is sufficient to establish the fact
that men very often reason falsely on any and every sub-
ject. In spite of his utmost care and greatest efforts,
the most vigorous thinker will not deal with even a com-
paratively simple subject without showing evidence some-
where of insufficiency, contradiction and incoherence.
What then shall be said of electoral assemblies, of popular
assemblies which prepare the laws, of the courts where
the pleas of counsel pave the way for the judgments,
and even of the jurist who works more tranquilly, to be
sure, but is no more certain to examine thoroughly all
the questions with which he deals?

Let us not deceive ourselves. The domain of the il-
logical, of error, is incomparably greater than that of the
logical, the rational, the true. We must not consider
error as a deplorable accident, but as a psychological
necessity for which no one is responsible. We must not
fight against it, at least not until we understand its nature.
It would be taking trouble for nothing and would not,
perhaps, be profitable. We must, on the other hand,
study it objectively and above all else with a scientific

purpose; but also indirectly from a utilitarian standpoint, in order to appreciate and, if need be, to correct it.

But is such a study possible? There is not one way of deceiving ourselves; there are thousands of ways. There is not one error; there are thousands of different errors which constitute very different psychological phenomena. We deceive ourselves through passion and emotional reasoning; we deceive ourselves through self-interest and sophism; finally, we may deceive ourselves through simple logical defectiveness.

We mean to study now only the errors in this last category, — those which are purely intellectual. Even these purely intellectual mistakes are of the most varied nature. It would be impossible perhaps to make a complete classification of them and the result would not be very interesting. All of them may appear in juridical materials; but the majority have an importance which is entirely occasional. Thus it is that no juridical monument of any importance is free from provisions and texts which are due to inattention, distraction, or forgetfulness — sometimes quite gross — on the part of him who framed the law. These mistakes cannot always be remedied and public and private interests may suffer through them. The text remains a text even when it has been badly framed.

But errors of this kind are entirely accidental. An effort of attention, a more detailed examination, may eradicate them from the drafting of laws.

There are, on the other hand, some kinds of error which seem to be the essence of real human thought. We are constantly coming upon them at all times and in all places. If we examine into their mechanism, we shall realize that they are necessary and that it would be well-nigh impossible to abolish them. These vices of our mental activity are no longer anomalies; they play the part of a social and intellectual function. We shall desig-

nate them "diseases of thought," without using the term in any derogatory sense.

These defects are certainly not diseases of the mind, for they are produced in the most sane and robust minds. But thoughts of this nature are certainly diseased thoughts, for nothing justifies them even in the intelligence of the one by whom they are expressed. They are the atrophied products of an intelligence which could not bring its ideas to maturity. They have always bewildered the psychologist, who has extricated himself from this difficulty by appealing to the passions, the emotions, and self-interest, the classical sources of unreason. But though obviously self-interest and passion do throw the intellect off the track easily, yet we must not forget that this happens almost as easily when the intellect acts quite alone and aside from any emotional intervention.

It may be recalled that in 1899 there was a furious discussion of the question as to "the end of the century." A great many people held at any cost that the year 1900 was the first of the twentieth and not the last of the nineteenth century. The discussion assumed extravagant proportions on both sides. Appeals to history and astronomy were made, notwithstanding the fact that history and astronomy were quite foreign to the quarrel. Nevertheless, those who expressed so many contradictory opinions could have agreed in counting a dozen oranges or a hundred oxen. There could have been no passion nor interest involved in this particular instance. Why so many incoherent discussions upon so simple a problem? The explanation is that the public had put its foot into one of those traps of thought which are so inoffensive in appearance and yet can paralyze the mind so definitively. My eminent colleague Millioud successfully disentangled its essential characteristic: "Confusion of the sign with the thing signified." To change the number of a century

in a date — something which happens only once every hundred years — is not the same as changing the century, something which also happens only once every hundred years, nearly at the same moment. The good sense of many practical and reasonable minds was offended because the day when they had to renew the date upon their letters for a hundred years was not the beginning of a new century.

We cannot neglect such symptoms. Diseases of thought are certainly phenomena of individual psychology, at least in their essence. They are connected with the cerebral force of each individual and are very satisfactorily explained by the single fact that the human brain is not of unlimited strength; that this strength, moreover, varies greatly according to the individual, and with each individual according to time and season. Doubtless, this weakness will be more accentuated in reunions or crowds than with the man who reflects for some time and alone. But the “raison d’être” is personal in each instance.

§ 2. *Principal Types of Diseases of Thought.*

I. *Credulity.* During the course of our existence, our own personal credulity causes us some vexation of spirit, but that of others may console us to a large extent. Poetic or prosaic, mystical or positive, intellectual or practical, — all natures seem on a par in the face of this superior and immortal force. Scepticism and mistrust do not protect us from it, nor does experience. Do we not see every day bankers and business men rushing into the most astounding adventures? Is not the crafty and distrustful countryman the chosen prey of the swindler? And philosophers! Those who have propounded the most substantial tests of human understanding have frequently evinced amazing simplicity in certain of their convictions. Lord Bacon, whose *Novum Organum* has done so much to improve methods of observation, relates in his *Sylva Sylvarum* most extraordinary facts which a little observa-

tion would have enabled him to appraise at their true value.

All men are credulous; not in the sense that, since human knowledge is limited, every one makes some mistakes; this would be simple indeed. But all men are credulous to such an extent that under certain circumstances even the most rudimentary intelligence is amazed. Those who do not believe that they are credulous are poor psychologists; they do not know how to observe the workings of their own minds and are therefore even more credulous than others.

Man is credulous in every matter with which he deals and in all questions which concern him. In our most elevated and disinterested conceptions of philosophic thought as well as in every detail of our practical life, we march on from one dupery to another. Any defence of our intellectual and moral interests finds us as unprepared as does a defence of our material interests. The law, be it understood, is no exception to the rule. The courtesan succeeds in capturing the credulity of the monarch; the orator who has the attention of the Assembly gains applause by taking advantage of its simplicity; the lawyer often mocks the judge who has decided in his favor. We must not neglect to mention history and historical scholarship. Not to speak of the publication of the letters of Lazare, how many learned works might we cite which are to be blamed for the excessive confidence of their authors in suspected sources. We ought not to be indignant or discouraged at the pathetic accord with which humanity allows itself to be duped time and again on every subject. It proves that credulity is not a vice but a cerebral function. A world composed of persons possessing clairvoyant powers would be perhaps — very probably, I believe — a monstrosity. Would it be an ideal world? Such an ideal is far beyond our reach. I shall leave to others the task of discussing whether it

would be worth attaining. It is more to our purpose to know why we are deceived so easily and are so powerless to defend our interests and our reason.

(1) *Credulity from Ignorance.* One of the causes of credulity is ignorance. It is very evident that a learned man can easily deceive an ignorant one. Since one cannot be learned upon every subject, it is necessary to have confidence in some one that is to be the dupe eventually of some one. Moreover, not acknowledged but concealed ignorance is the more dangerous. Take the case of the countryman who assumes an attitude of confidence about something that he does not understand in the least. In all domains, we are less often the victims of our lack of knowledge than of a stupid "amour propre" which makes us to pretend to know.

(2) *Credulity from Lack of Reflection.* Lack of reflection is also a very frequent cause of credulity. Thus Flaubert relates of himself an incident which illustrates a tendency toward this absent-mindedness. He was a middle-aged man when, upon his gardener saying to him, "Go to the end of the garden and see if I am there," he proceeded very seriously to execute the commission. The gardener must certainly have thought that Flaubert was lacking in intelligence and that he was very much his superior. Now it is precisely because Flaubert was already a thinker and his mind was occupied elsewhere that he allowed himself to be entrapped so easily.

(3) *Mystical Credulity.* The human mind is possessed of insatiable curiosity. Should this be matter for reproach? But because of this curiosity, what the mind has once learned interests it much less than it did at first, or not at all. Something new and something which is as different as possible from what it already knows is a necessity to it. Hence a pronounced taste for the extraordinary, the marvelous, and the mystical. A phenomenon will appear to us all the more interesting in so far

as it is in contradiction to all established laws. This tendency has been designated "the childlike mind." No doubt with age and regular work one finds more pleasure in studying the most commonplace facts than in marveling at incomprehensible phenomena. The mind inclined to mysticism runs the greatest risk of deceiving itself and of being deceived. But this boundless curiosity is also a powerful intellectual stimulant. It is easy to imagine that since superstition is the opposite of the scientific spirit, the periods when superstition triumphs under the most varied and extravagant forms ought logically to be the periods of darkness and of the arrest of human thought. But on closer view, history shows us that quite the contrary is the truth. Times of great intellectual progress are also favorable to all charlatanism. We are as eager for philosophical as for strange and unreasonable thought. This coincidence is particularly remarkable in the history of the Pythagorean development. In proportion as these rationally profound doctrines which paved the way for the century of Plato became elaborated, practitioners of magic flocked from all directions to the centre of philosophic thought; in the customs and the legislations of this period the sorcerer played the most important part. This is not an exceptional instance. It might be verified in the history of all peoples.

Belief in the mystical is very easily associated with the greatest logical subtlety, the most exact precision of judgment, and the most profound intellectual penetration. There are examples of this which are so celebrated that it is unnecessary to cite them. Very well-known works have given quite different explanations of the abnormal phenomena of the subconscious. Some arrive at positive, plausible conclusions by scientific paths which seem preferable to those of authors who incline more or less toward mysticism. But if we judge them not by the value of the conclusions, but by the value of the intel-

ligence displayed, we sometimes find greater clearness, argumentative force, and mental vigor among those who draw their conclusions with a mystical significance (we are thinking of Dr. Geley's "L'être subconscient") than among those who know how to remain always upon "terra firma." The value of an intellect is not a guaranty of the value of its conclusions.

(4) *Credulity from Limitation of Means of Testing.* There is another very different and perhaps still more dangerous kind of credulity. He who is a victim of this has nothing with which to reproach himself from the point of view of logic, unless it sometimes be with a rather too great self-confidence. This is the case when we are deceived by making our own perspicacity work against us. In the practical and professional life we all employ certain means of testing to verify the exactness of certain facts. But these means never have an absolute value. They are especially valuable to those who are ignorant of them; once known, they often become entirely useless. A sick person who has carefully studied a doctor's book can sometimes deceive a physician by giving in detail all the symptoms of the disease which he wishes to attribute to himself. This is why the precautions which the law tries to take against any specified kind of fraud are of very doubtful efficacy; for the law is for the defrauder an unmasked adversary, while the defrauder is for the law a masked adversary. In the struggle between the police and malefactors, the struggle is more equal; the wiser of the two will dupe the other by his own methods. Edgar Allan Poe, whose genius is even more generalizing than imaginative, has propounded this principle in a detective story. The processes of investigation and of criticism are of value for each "so far as his labors extend," that is, in the circle of his activities and capacities. He who is beyond this circle escapes and can, at his ease, mock at all the precautions that have been taken against him.

We have distinguished four types of credulity: (a) credulity from ignorance; (b) credulity from lack of reflection; (c) mystical credulity, and (d) credulity which rises from a limitation of the means of testing. The subject is certainly not exhausted. We may definitely conclude, nevertheless, that it is a question of very varied and inevitable psychological phenomena. Of course we must combat the errors which result from them wherever we come upon them, but without deceiving ourselves into believing that we can destroy the root of the evil. For him who studies human psychology and psychology of the law, which is one of its branches, credulity is an intellectual and irrational function, — an element of individual and collective thought which is very evident and very easily observed and analyzed. We encounter it at every step of juridical development.

II. *Language Myths.* Those narrations, always full of imagery, often poetic, and sometimes incoherent, that form the basis of different mythologies, seem to reveal the existence among primitive peoples of an extraordinary imaginative power and an exuberant fancy accompanied by a very pronounced taste for the marvelous. But in the oldest mythologies and in the oldest versions of various mythological narrations, incoherence, numberless contradictions, and contempt for the most elementary logic are the dominant features. We cannot be astonished that the various primitive peoples have believed in supernatural beings, that to these beings they have attributed the qualities and actions of men by exaggerating them with all the power of their imagination, and that from this have sprung the fabulous legends which we find in nearly every quarter of the globe. The credulity of primitive peoples cannot be a matter of surprise, and it is not the mythological side which interests us.

But credulity does not explain the looseness, the contradiction, and the incoherence of episodes originally

placed side by side without any logical connection. Certain mythologists and philologists have given a learned and ingenious explanation of this, and it has been discovered that this explanation is of value not only in the interpretation of the history of religions. It reveals to us a particular tendency of the human mind which has existed from time immemorial and which thinkers of the ancient world have pointed out occasionally without suspecting, however, its rôle in the development of civilization. A rather unexpected reconciliation has taken place between mythologists, sociologists, jurists and philosophers. From this has sprung the theory of myths, no element of which is properly mine, not even its application to the formation of law; but I have made an analysis of this theory which is perhaps different from that of any other author.

(1) *The Language Myths of the Ancient*. In studying the origins of Indo-European mythology, Max Müller seems to have established conclusively that primitive narrations of fables sprang, at least to a great extent, from the awkward handling of the primitive language, — from the confusion between words and the objects represented, from the lack of understanding of abstractions and metaphors and their transformation into divinities. This is what he has called “diseases of language.”

Thus the Vedas, which are composed of liturgical formulas and metaphors intended to celebrate divinities such as the stars or the sacred fire, have been translated from the abstract into the concrete in Brahmanical literature. The elements of the Hindu legend of the flood are to be found in their entirety in the Vedas, but the idea of an actual deluge is completely foreign to them. The Vedas are concerned only with describing the ceremony of sacrifice in terms abounding in images which were later interpreted as real facts.

It is not in our province to judge whether the method of Müller and his followers is justified in any specific

instance; still less does it concern us to determine the proportion of exaggeration of which this school has been guilty in trying to trace back the whole formation of religious legends to "diseases of language" alone. Doubtless there would never have been any religion without the sentiments of hope, fear, the love of the mysterious, fancy, the spirit of organization and æsthetic impressionism; and it was fitting that each factor should do its part. In itself, the phenomenon of "diseases of language" (the employment of abstractions and metaphors by certain minds and the literal and concrete translation of the abstractions by others) is an incontestable fact. In ancient times some saw real facts where others had intended only to formulate symbolical ideas. Now these misunderstandings caused by metaphor and abstraction have continued throughout the whole course of civilization and in every domain of thought. Abstraction is a matter extremely difficult to handle; very few grasp its exact import. Each individual translates such abstractions in his own way and according to his own intellectual power.

The analogy between the "language myth" of ancient times and what we shall call "the modern language myth" ought not, however, to be exaggerated. The confusion formerly arose above all else from the rudimentary state of the language. There was no form which permitted of a distinction between the concrete and the abstract; attributes were easily taken for beings independent of the objects qualified. Thus primitive minds pursued the path of error to its very end. The metaphor became a reality no matter how absurd and devoid of interest its concrete translation might be. If the celebrated metaphor of M. Prudhomme had been formulated then, "the chariot of State sailing over a volcano" would have been presented in the myth as a real chariot, a real sea and a real volcano.

(2) *Modern Language Myths.* The myth of the present time is not identified with this. The human mind and human language have progressed. We no longer take metaphors and abstractions for physical beings. We know that Reason, Justice, Goodness or Equality has not a head and arms and legs. Here we see enormous progress from the point of view of plain common sense. There are, on the other hand, some abstractions which are understood in nearly the same way by everybody. Such are physical abstractions as color, size, length and breadth. Some intellectual and moral abstractions retain a certain degree of precision for the majority of persons. But there are others whose names assume an existence independent of the senses, or which even dispense with the reasoning faculty altogether. A word takes its own independent course, quite like a mythological god; it has its hour of triumph and of defeat, it is revealed by turns as human and beneficent, as tyrannical, cruel or weak, without being at all restricted in its incessant evolutions by its rational content.

(a) *Liberty.* "When we have once found the means of catching the masses with the bait of liberty, they follow blindly provided they only understand the name of it," said Bossuet à propos of the English Revolution. Since then, and doubtless long before, in every instance Liberty has followed a triple course; it has lived and influenced the world as an abstraction, as an ideal and as a myth.

As an abstraction, it has undergone the logical analysis which has shown the various domains to which it is applicable, the forms which it takes in these various domains, and the limits necessary to its proper realization. Thus the liberty of one person is restricted by the liberty of another; the authority of a judge was imposed in order to maintain equality in the liberty of different individuals. It would be very unjust not to recognize all that has been gained from a theoretical and practical point of view.

Much of what was the rational development of the idea of Liberty now sleeps peacefully in the silence of libraries. But it has left upon positive legislation beneficent effects which, without being absolutely certain, we hope to be definitive as they are substantial.

It is none the less true that by the side of Liberty, the abstraction, has dwelt Liberty, the myth; and that in the numerous encounters between them, the myth has conquered the abstraction. The history of all revolutions, of all democracies, and of all government by demagogues will lead us to repeat with more and more bitterness the famous saying of Bossuet: What despotic terrors has not the sacred name of freedom evoked! "Citizens, I arrest you in the name of Liberty," was the refrain during the French Revolution. We must acknowledge that the irony was not entirely unjust.

Besides we must excuse the masses from failing to recognize the content of the abstractions which they have set up as idols, since thinkers, and not the least among these, have furnished the worst examples in this respect. What insanities have we not tried to introduce into the definition of the word liberty? "Liberty is the ability to do what we ought to do," Montesquieu said; "the ability to do good," "the freedom to devote one's self to the State," "the freedom to take part in public life"; these are some of the definitions of other authors. Doubtless, those who have expressed themselves thus wished to comprise moral considerations in these vicious formulas. Were they right or wrong? That is their affair. But they have excluded themselves from the domain of rational logic and perpetrated pure nonsense. It would be a very happy state of things if everyone would employ his liberty to do good, to do what he ought to, etc., etc., but it has nothing to do with the definition of Liberty. It is exactly as if we should define a franc as "a piece of money destined to be given to the poor." It is as moral to give francs to

words of charity as to saying mere liberty to do one's moral duty. Nevertheless, no economist has given an analogous definition of money. What proves that moral philosophers are in great need of introducing a little precision into their language.

When we have managed to make an abstraction express exactly the opposite of what it generally signifies, as when words, when we have perverted the word "duty" into the definition of liberty, the natural utility has been completely destroyed, a myth or fictional intellectual being has been created, and we see that it is not the people alone who are deluded. To denote a word of its true meaning is not to appropriate its privilege to oneself is a very common practice in all politics, and the progress of the law has left no efforts to a *considerable extent*.

We must not confound the idealization of an abstraction with its transformation into a myth. To idealize is to attribute supreme value to a *concrete* being or an abstract conception. But to idealize does not prevent us from judging. The will of La Fontaine understood very well in what "Liberty" consisted. He judged it well, very concrete data, and his conception is in perfect accord with the most *scientific* definition. He understood it and he idealized it; he placed it above every other good. He preferred it to "the right to do his duty" and the prospect of the honor of the policy and progress did not even take form in them.

(b) *Solidarity*. The myth "Liberty" having grown a little large, there is a tendency to substitute for it the myth "Solidarity." If we try to analyze the myth "Solidarity," it is not for the purpose of criticizing the ideas of altruism, generosity, benevolence, and human optimism, which, rather confusedly, to be sure, range themselves under this word. This is an example of practical rationality, — a lack of understanding of

the mechanism of abstraction which is somewhat different from the preceding.

"Two things are solidary," says the philosophical vocabulary of Goblot, "when one is not independent of what affects the other." This definition does not tell us whether the dependence has to be reciprocal. It does not seem so in the mind of the philosopher, for he adds as an example, "Heredity is the solidarity of successive generations." Now, if the descendant depends upon the ancestor, the ancestor does not depend at all upon the descendant, at least upon the one who is born after his death. Nevertheless, juridical language more precise than the preceding definition always sees a reciprocal relation in solidarity. It seems to me difficult to deprive it of the idea of reciprocity. Let us then define solidarity as "a reciprocal dependence." We have thus made real an abstraction which can be useful to us in the study of concrete reality.

As soon as we try to apply the ideas of solidarity to the objective examination of human life, solidaristic and individualistic tendencies reveal themselves. The former carry to an extreme man's reciprocal dependence in all domains; the latter give more importance to individual and private effort. Moreover, both can only affirm the phenomenon of human solidarity, but they differ in the appreciation of its importance. Both are true to the rules of logic. But the believer in solidarity goes farther. "Mutual dependence between men brings it about that some can be happy and develop only if others can also." This assertion goes far beyond the bounds of experience. It would be very lovely indeed if all men could be happy together and if the happiness of one could exist without the unhappiness of another. But to affirm that this is always the case, and that the happiness of one always creates the happiness of another is to defend too ardently the opposite of reality!

But this theory of solidarity abounds in many other logical errors. Some valued thinkers regard as superior those institutions which create the closest bonds between men. This confuses what is and what ought to be. What makes a myth of the word "solidarity" is the inextricable confusion between different conceptions which by themselves might have a logical or a moral and moralizing value.

(c) *Forms of Government.* Forms of government have, especially in France, constituted true diseases of thought. Of course, it is legitimate enough to have well considered and even instinctive preferences for the Republic, the Monarchy, the Empire, or any form of constitution which one wishes. We have, however, gone somewhat beyond the limit and made veritable divinities of simple words. Constitutional questions are serious ones, no doubt; but there are thousands of others equally serious. Moreover, precisely because we are dealing with serious questions, it is quite reasonable to hesitate, to follow no standard, to have no precise and unalterable opinion in political matters. This is a truth which has surprised and perhaps will still surprise many people. The type of man who was and still is honored is the one who was born in a party, has never discussed its principles, has sacrificed everything to its triumph and dies without ever having changed his opinions. He will even have the esteem of his adversaries, to use a time-honored formula. But he who tries to search for the realities behind the labels, and seeing that the superiority or inferiority of any particular régime is purely relative, refuses to tag himself with any constitutional form whatever, falls into the disrepute with both sides.

The juridical domain is very favorable to the hatching of myths. A principle of law that has become popular is nearly always imperfectly understood. For the law lives by fictions, and a fiction is nothing more than a meta-

phor. When, in order to characterize an absolute monarchy, we present the will of the king as the supreme source of law and organization, there is invented a psychological phenomenon which cannot become a reality, for the most authoritative sovereign is able to influence legislation only to a very limited extent. Sometimes, he is absolutely uninterested in it, but the principle will not be changed. He will preserve as his motto: "Thus I will, thus I order, let my will take the place of reason,"¹ even when the weakness of his character or the liberality of his mind would prevent his committing any act of authority. The sovereignty of the absolute monarch is only a metaphor.

The "sovereignty of the people or of the nation" is still further from reality. For — aside from the fact that an act of collective will is difficult to conceive — very few citizens intervene effectively in the making of laws and in the political guidance of the country. As long as a person understands what it is to which he is adhering, he is not the dupe of words; as long as he is convinced that every juridical principle is artificial and can be replaced only by another principle just as artificial, the employment of myths is perfectly legitimate. Juridical science cannot do without them. Political science may also be guided by them. A constitution with referendum contributes more largely to the idea of "national sovereignty" than does a constitution with purely representative power. But no organization can transform what is purely metaphorical into reality. Now to many minds "national sovereignty" is a reality, a superhuman reality, a sort of divinity to which one ought to sacrifice one's individual existence. It is a veritable "myth," springing from a psychological phenomenon which is very analogous to those which gave birth to the old Aryan myths.

¹ Sic volo, sic jubeo, sit pro ratione voluntas.

III. *Historical Myths.* With the "language myth," which results from the misunderstanding of metaphors and abstractions, there is often confused a category of very different psychological phenomena. These phenomena have been particularly well studied by George Sorel, so well indeed, that they might be termed the Sorelian myths, if it were not slander to attribute to anyone a paternity which he would not perhaps care to claim; for one is never sure of interpreting with exactness the thought of another, no matter who; and the Sorelian myth which I wish to analyze might indeed be disowned by its inventor. I shall therefore call it "the historical myth."

There is a force in history, an intellectual and irrational force, namely, the belief, the faith in an approaching event which retreats little by little because it is extremely distant or even out of our reach. This is the illusion of the man who scales the mountain and believes himself very near the top; of him who is the victim of a mirage, or chases the rainbow; this is "the image of peoples working for empty nothingness, the victims of the pride of a few." At its foundation, "the historical myth" is an irrational conception of the future. Foresight of the future escapes us, the future baffles our best laid plans, but it is none the less true that between our intelligence and the future there exist certain relations, which it is irrational not to take into account.

Every representation of a future event is, to a certain extent, illusory or mythical, for things never come to pass exactly as we have foreseen them. Our uncertainty in regard to the future, the mistakes in our foresight, are not the faults of our thought, provided, however, we have observed certain rules. We must not prophesy things which are contrary to good sense, and impossible or difficult of realization. No more must we deceive ourselves too much as to the degree of probability of an

event. Faith in the future ought not to be blind. Sane logic demands that we do not assert as certain a future which is doubtful. Rash foresight, even when it becomes realized, belongs to the domain of irrational thought. All prudent foresight, even if it does not become realized, is justified rationally. Thus Robida, in his "*Vingtième Siècle*," foresaw aerial navigation, which has become a reality. He foresaw a continual lowering of the rate of interest, which has not become a reality, but in which many economists of his time believed. These two instances of foresight were equally rational and all the more so since, as the work was an imaginative one, the author made no claim to infallibility.

The historical myth is the affirmation, with much more energy than reason permits, of a doubtful, sometimes even an unrealizable future event. Sorel indicates as such the "catastrophe myth" of Karl Marx, which supposes the sudden disappearance of capitalism, — the "general strike," by which productive workmen will impose their will upon their employers. Beliefs of this nature have always existed. Up to the Middle Ages and even to the Reformation, the conquest of the Holy Land was of this character. People believed firmly that this event was near at hand, and this belief had an influence upon home and foreign politics in the different countries. For the "historical myth" is a force and a very powerful force. It arouses more energetic action than does a reasonable conviction; infinitely more. No one doubts it or has ever doubted it. From the greatest soldier to the most insignificant candidate in a municipal election, all who struggle for supremacy assert that their victory is more than certain. They know that to create such a belief is to acquire an essential element of success. Man puts forward his greatest effort only when he is convinced of the result; the least doubt paralyzes him.

But in Sorel's opinion, the myth is something more.

This firm belief in a future event is expressed in a brief formula which has no precise logical content, but is susceptible of becoming translated into imagery. The expression "general strike" ought not to be analyzed. It brings up in the mind of each workman concrete and varied images which represent the submission of the employer and the triumph of the laborer. Such imagery is an inexhaustible fund for the imagination, which attaches to the myth much more than the exact and definite representation of the result to be obtained. Thus the ideas of heaven, of hell, and of the end of the world, are construed in the mind by more or less æsthetic pictures, but to define these ideas in rational terms is almost an impossibility. Sorel, who is a follower of Bergson, sees in this a philosophical superiority, for these "myths" which appeal to instinct and not to reason may be the object of a knowledge which is superior to rational knowledge. In my opinion, these diseases of thought seem wholly explicable in so far as they indicate intellectual defectiveness, and the mysterious force which may dwell in them is not apparent to me, although it seems to me unwise to assert that it does not exist.

These psychological phenomena are much more distinctly emotional in their character than the "language myths." They are illogicalities and by this right constitute intellectual facts. But they are very often accompanied by emotional elements, — violent desires, and foolish hopes, which set in vibration all the nerves of the human body. They arouse the passions; they may also quiet suffering. The myth of a durable peace which will succeed merciless war softens grief which without it would be too cruel. In such instances as this the sternest logician will be silent and allow the myth to accomplish its beneficent work. The historian who has the responsibility of neither the present nor the future but concerns himself solely with understanding the forces which have

acted in the past, must find in our institutions many destroyed hopes, often many absolutely unreasonable ones, to which generations have consecrated their lives.

Man goes from deception to deception, and this is perhaps not an evil. A mythical conception is of infinitely more value than too precise and well-studied foresight. The most fortunate event can only become realized in a single manner and we can imagine it under a thousand different forms. Thus if the general strike ever becomes a reality, it would be a great disillusionment for those who desire it most. We should scarcely have heart for our work if we knew exactly what would be its results.

IV: *Fashion*. There are fashions in the highest metaphysical thought as well as in the smallest details of dress. There are fashions of living and of dying. Certain kinds of activity, certain professions, certain intellectual or moral qualities, and certain religious beliefs are by turns very much in vogue or very much out of fashion. There are remedies — it has often been said — which cure only so long as they are the fashion. Are there not juridical fashions also? Beyond all dispute, fashion rules here in doctrines as well as in practice. It determines the substance and the form of the law. The eminent magistrate, the celebrated lawyer, and even the learned jurisconsult, sacrifices as much and more to the fashion than does his wife, however worldly she may be.

In the development of juridical schools considerations of this nature are all powerful. Among the glossators of the twelfth and thirteenth centuries, who, it seems, devoted themselves to the dry and arduous study of the texts of Justinian, this desire for the new was as strong as it was anywhere else. Works rich in ideas are neglected and give way to flat and tiresome productions because the former are too developed and the fashion has changed to brevity and conciseness.

"This man studied to state great doctrines briefly,
That the brevity of his work might please the mod-
erns." ¹

Fashion is an illusion of progress. It is very difficult to judge any novelty as soon as it presents itself; a trial of it must be made to see if it is worthy of displacing what already exists. When the experiment proves a failure, and it appears to us futile to have made it, then this experiment may have been, to a certain extent, perfectly legitimate. Fashion is again the pleasure of changing for the sake of changing through weariness of what exists, and for the pleasure of marching in the forefront and considering others backward. It is again perhaps the wish not to be out of accord with one's surroundings. In every instance, it is a phenomenon of the irrational action of the intellect, — a disease of thought. Its influence upon human conceptions has been established too long a time for it to be necessary to dwell upon it.

We have examined only a few types of intellectual defectiveness. These suffice to show us that this portion of psychology is extremely fertile. Diseases of thought are not accidents which any one can avoid by employing even the best method and applying it with proper attention and regard for details. They belong to the nature, if not to the essence, of human intelligence.

§ 3. "*Diseases of Thought*" and *Legal Development*. If we lay it down as a principle that truth is always good, and error always evil, we must conclude therefrom that it is to be regretted that the development of the law has been directed in great part by forces which are logically defective. But, in itself, truth is neither good nor evil. The true and the good are two ways of imagining things and between them there is no necessary relationship. Practically, and when we give to the words "good and

¹ Hic breviter studuit dogmata magna dare,
Ut brevis operis possit placere modernis.

evil" the usual and purely relative meaning, we might believe ourselves to be warranted in affirming that it is better for man to be governed according to rational principles, than to allow himself to be influenced by words devoid of any logical meaning. To some minds, this proposition would seem self-evident, when, in reality, it has neither deductive nor experimental value. A law made only by logical minds and pursuing by logical means ends capable of realization is unknown to us. Humanity without its "diseases of thought" would no longer be the humanity which we study. As well unearth the habits of the unicorn and the hippocampus.

On the other hand, the theory of irrational intellectual activity extricates itself from the difficulty almost entirely unaided. We construct upon the most absurd axioms, reasonable, practical and sometimes even ingenious institutions. The "national sovereignty" which Duguit proposes to throw aside, has been — so he proves — a myth of extremely powerful progressive force. George Sorel also sees in myths a source of fruitful activity. Myths have their detractors and their enthusiastic supporters.

At certain periods of history, the disillusioned lovers of the goddess Reason, asserting that her part in the history of institutions is not important, try to discover the identity of the mysterious contributor to whom the law owes its beneficent and harmonious existence. They invent secret forces, instincts, subconscious states, and institutions, some secret intellectuality, some transcendent purposiveness which would combine the poetry of mystery and the prestige of reason. The theory of myths directs us differently. The goddess of Unreason or of inferior Intellectuality appears to us as a much more positive force. She can hide nothing from us; she alone can give us the solution of many enigmas.

It is certain that a mistake or a blunder does not in-

evitably occasion unhappiness, and the truth, happiness. There are instances where lies may bring happy results, and such instances are numerous. To conceal danger may be a duty, at least a praiseworthy action. Peoples are like individuals in this respect. "Decipi vult vulgus." The populace wishes to be deceived because it needs to be. The myth may often be a salutary error; and for the following reasons:

I: *The Myth as a Factor in Energy.* The irrational, the myth, is above all else a factor in energy, a quality which recommends it to modern minds which love energy for the sake of energy. "Diseases of thought" permit a great deal of acting, a great deal of talking, a great deal of writing and very little thinking. What periodicals, parliamentary treatises and lawyers' speeches, what collections of decisions and judgments, might never have sprung from this colossal semi-intellectual activity if it had to be submitted to the strict rules of logic! Mythical thought works tremendously and its labor is sufficient for everyday life. It can create a great deal because it is accessible to all and collaborates with all because it conceals the difficulties of abstract thought, and because it creates a belief in the speedy realization of the most foolish hopes. No one would be willing to put forth tremendous effort for a result which is often very trifling. The old man in La Fontaine's fable created a myth when he made his children believe that he had buried a treasure in his field. Thus he taught them the value of work, and certainly if all myths produced such happy results, they might be pardoned their unreal and illogical nature. It is none the less true that the sons worked because they were deceived and would not have worked if they had not been deceived.

All myths do not have such good results. Effort does not always assure success. How many races, how many people have bungled their careers by not knowing how to

remain quiet! We accuse intellectuality of paralyzing action. This is true in one sense. The intellectual man is certain of more things than is the man of action, but he also is more scrupulous, for rational logic can seldom guarantee that a certain course is the only good one. Mythical energy chooses arbitrarily any course whatsoever. If in opposition to one myth, contrary myths are set up, the loveliest scenes of incoherence and violence may be unfolded to the great delight of some, and the confusion of others. Mythical thought is always more disquieted, but it is not essentially more disquieting than rational thought.

II: *Mythical Constructions*. In a mythical generality¹ there is much beside unreason. The myth is at the basis, but generations succeed one another and endeavor to efface everything which can directly offend good sense. The story of Tom Thumb is composed of absolutely incongruous notions: a poor wood-cutter, a child as small as one's thumb, children lost in a forest, birds which eat bread, an ogre, seven-leagued boots, etc., etc. From these data are built up narrations which are at first incoherent, but by degrees better and better arranged. The bond which unites these diverse ideas seems to us very natural, since the story is now logically connected. Each of the factors in these data was simply a mistake in language, a misunderstood metaphor, and, nevertheless, the rational intellectuality of man has made of these ramblings narratives that are so well presented that in spite of their fantastical content we ask ourselves if they are not really true at bottom.

The case is the same with moral and juridical generalities. Their elements have often been in the beginning incongruous and opposed to common sense. But a series

¹[The author's own word here is "construction." The nearest equivalent in English is "generality." But in the next chapter, where the term is more elaborately treated, it has been rendered "construction." For a full explanation of its meaning, see the footnote to § 4 of Chapter XI. — ED.]

of logicians have adjusted them to one another, and, by giving them subtle explanations, have carefully touched up whatever could have offended the general intelligence and in the end presented a system perfectly rational as a whole and in its parts. Nothing of the mythical remains except a small element, carefully concealed and difficult to discover, and if we do not discover it, we may imagine that the theory has an absolute value, while in reality, its value is purely relative, quite as relative, indeed, as that of other theories less well-worked out.

The "sovereignty of divine law," once admitted as a first principle, has provided ground for perfectly rational and indisputable generality. The "social function" myth, a corollary of the "solidarity" myth, can, by becoming combined with new elements of a different nature, furnish a plan of social organization which is very satisfactory from a logical point of view, so long as we do not criticize its basis. When the generality is no longer satisfactory to us, we accuse the logician of having misused the principle of deduction. This is a deep injustice. The logician did all that he could do. A myth was furnished him and he dressed it up in the fashion of the day; he could do nothing else. Moreover, nothing else was demanded of him, because human life perhaps does not need anything else.

III: *Proper and Improper Aspects of the Mythical Generality.* When a mythical generality has been systematized by one or more thinkers, there no longer remains in it anything irrational except the manner in which it is presented — its pretense of being what it is not. It is a fiction, an hypothesis, perhaps even a possibility, but it believes that it possesses the characteristics of reality, objectivity, and necessity. If I draw conclusions from a principle which I acknowledge to be false or doubtful, I am perfectly justified in reasoning hypothetically. "All men are good; they can do only good," is a very

dangerous assertion. By putting it in the conditional, "if all men are good, they can do only good," we restore to it a reasonable meaning.

The political theories of a Saint Thomas Aquinas would be unassailable if he claimed to construct only a system as tenable as any other. All the great political writers are in the same situation. They are wrong in believing that they are elaborating doctrines which are necessarily correct.

Now, among individuals as among peoples, there are those who doubt themselves and those who are rather too self-confident. Only the last are intellectually inexcusable and practically dangerous. Under the most diverse disguises they are all the same Torquemadas of Thought. The others, on the contrary, are easily excused for employing an imperfect intelligence for lack of a better, relative principles for lack of absolute ones, and fictions instead of unattainable realities.

In one of the most beautiful scenes in a drama of the poet Mistral, we read of galley-slaves who, chained to their benches, sing as much to enhearten themselves as to row in unison. They believe they see the light of a fairy castle to which they seem quite near. They believe they see it; they are not sure, it is perhaps but a star. They conclude in a chorus "Castle or no castle, let us row as if it were there." Since each of us must remain chained to his galley-slave's bench, why should we refuse to believe that we are about to reach the marvelous castle of the fairy Sérane? We believe we see its lights. It is perhaps a star that deceives us, but what does it matter? "Casteu o noun castéu, fasén coume s'i' ère." Mistral's rowers create for themselves the only truly profound and philosophical conception of the myth.

§ 4. *The Myth and Legal Fictions.* Legislative and judiciary powers easily allow themselves to be allured by myths. Doctrinaires cannot expel them from the jurid-

ical domain, but they can transform the "myth" into "fiction." A great deal of thought has been devoted to the "legal fiction." Superficial criticism has condemned it without a hearing, that is without defining it or explaining why it is worthy of condemnation. Certain writers have labored under the strange delusion that the law can be constructed upon objective realities. We shall see later what is to be thought of this. However, we affirm in advance that, quite the contrary, juridical theory is all the more objective when it presents itself as fictitious, and all the more delusive when it claims to do without fictions.

I. *The Rational Element in a Fiction.* Fiction is nothing more or less than hypothetical reasoning. Starting from facts which are doubtful or false, it can be conducted with as much rigor as argumentation based upon real and certain facts. The exact sciences — notably geometry — make constant use of fictitious reasoning. Juridical fiction is therefore not to be condemned, provided it points out as artificial what is artificial.

What the legislator affirms as a dogma, the legal writer considers as an hypothesis. He does not take the responsibility of any affirmation. At every turn the legislator proclaims as useful, necessary, or sacred, principles which he could not know how to justify logically as such. When the jurisconsult, whose business is not to appraise but to interpret, approves or finds fault with the thought of a legislator, or adopts toward the law a respectful or a sceptical attitude, he lays down principles only as fictions. The French law lays down the principle of the superiority of the husband to the wife and gives him supremacy in the management of the household. The jurisconsult can not fail to take this into account, otherwise he would not be writing on French law. In making the application of the principle to any particular case, he performs purely and simply an act of hypothetical reasoning whose logical

value is entirely independent of the principle itself. If the man is in reality less fitted than his wife to the conduct of their affairs, the theorist is not affected by the fact, for it is not for him to declare the contrary. All that ought to be deduced logically from the marital supremacy, he will deduce, for that is his first duty.

Only, theoretic constructions¹ of positive law are very seldom truly logical deductions; they are artificially logical constructions. Their conclusions are generally connected with the principle by extremely complex bonds which are logically simple in appearance only. From the idea of marital authority or superiority, there is deduced as a conclusion, the impossibility of a woman's figuring in a civil suit even as a defendant. It would be quite impossible for formal logic alone to connect the concrete application with the principle by the bond of necessity. But the theorist is not wrong in stating the principle intended by the law, "the wife owes obedience to her husband," and then pointing out the numbers of concrete cases which the law indicates as being the consequence of this principle. The connections thus formed are artificial, but they are fictitiously true and can serve as a basis for a perfectly rational construction.

The theorist receives from the legislator certain legal rules and concrete decisions of varied origin. From all these he has to compose a harmonious whole. The juriconsult often succeeds so well that he is sometimes deceived and believes that he has discovered a real harmony where there is only an artificial harmony. It seems to him that the concrete solutions which have been brought together by chance and ingeniously arranged by him, have their "*raison d'être*" in this same arrangement and that he has only discovered a preëstablished harmony between these diverse elements. Take any myth what-

¹[This word "construction" may also be rendered "generality." For a full explanation of its meaning, see the footnote to § 4 of Chapter XI. — Ed.]

ever, — “divine right,” “social contract,” “will of the people,” “social solidarity,” — and any constitution whatever, and it is easy to establish rational relations which are sometimes extremely ingenious. These constructions are very legitimate and useful; but we must not deceive ourselves as to their true nature.

Every system admits of principles and modifications of these principles. Let us take, for instance, blue principles — conservatism, aristocratism, and collectivism — and red principles — liberalism, democratism, and individualism; — it is equally easy to give to any legislation whatever the blue or the red label. In the first combination, authoritarian provisions would be classed under the rule and liberal provisions as exceptions; in the second combination, the reverse would be the case.

Bentham, in his dialogue “Truth against Ashhurst,” seeks to put Toryism in opposition to the liberal principle which is thought to dominate all legislation. “The law of this country admits of no restrictions upon the actions of individuals other than those which are necessary for the safety and good order of the community in general”; thus Judge Ashhurst. To which the laborer, Truth, opposes all the vexations of the law which without benefit to anyone prevent him from working where and how he wishes. He affirms that the English legislation of his time can count more than a thousand restrictions upon liberty which are useless and even harmful. No doubt, he was right in fact, but wrong in logic. Since the good old judge had entire confidence in the wisdom of the legislator and took into account the latter’s claims to liberalism, he was obliged to admit *by construction* that all legal prohibitions were necessary to the good order of society.

If we see fit to lay down the contrary postulate, “The law of this country does not accord any initiative to the actions of individuals other than that which is necessary to the safety and good order of the community,” we

should reverse the construction. The prohibitive measures would have no need of justification, and the liberal ones would be justified by the public interest. The two constructions are fictions, and rational so long as they are fictitious. They are mythical, on the contrary, if we fancy that concrete dispositions of the law spring really and logically from the general ideas with which we connect them.

From the point of view of formal logic, the blue combination with the red exceptions, or the red combination with the blue exceptions, are identical when they have the same content. The actions permitted or prohibited are exactly the same. In juridical logic, it is not a matter of indifference, but, on the contrary, one of great importance, to know what constitutes common law. Common law is virtually more powerful. It comprises within it all unforeseen instances, and is found to be superior to the exception, even when it appears to be equal to it. Juridical construction chooses those elements which are endowed with attractive power; but in assuming to itself the authority of formal logic, it claims to be what it is not and thus is of the nature of mythical thought.

II: *Mythical Terms and Expressions in Law*. There are in law many instances of mythical thought which have passed unnoticed. Often the legislator and those who interpret the laws use expressions whose prestige no one disputes, words which are conclusive to all and which it would seem sacrilegious to try to examine too closely. These are magical words to which we owe the civilization which surrounds us and the protection the law affords us. That is true. The words are magical because they are mythical; they are suggestive and indefinable. It would be foolish to try to disturb their authority or even to demand a more precise and colorless terminology. But in the task which we have undertaken of connecting the juridical past with philosophical thought, we cannot neglect to give an example,

Take the expression "public order" in the French Civil Law. (We could, be it understood, find identical examples in all modern legal systems.) Certainly, everything which is related to "public order" is respectable; to suppress public order would be to suppress the law. We may range under this expression what is most elevated in our civilization — and some other things too. For these words "public order" are not in our law susceptible of any logical definition. The legal writers who have tried to give even a very vague analysis of them have only considered certain concrete cases and not all the concrete cases to which they are applicable. It has been recognized that it is impossible to find a criterion by which to classify the laws of public order and that it is equally impossible to enumerate them. What then? Well, the legislator should have taken the trouble to have pointed out in each instance what public order is, and what it is not. Now, he did not do this, and we cannot make good his silence, since we have no sign from him and can find none. Moreover, when public order is violated, the law or the State reacts in absolutely opposite directions on different occasions. Sometimes the State and its representatives in the judiciary branch feel that they are directly offended; they will then take the initiative in repressing those who are to blame and will prevent the incriminated act from producing its harmful effects. In other instances, the State and its agents confine themselves to turning their backs upon the displeasing act, but do not interfere. If the parties are in agreement, they may continue their traffic indefinitely, in spite of the fact that the law does not look upon it with favor. Justice will not always annul the consequences of covenants contrary to public order even when they are realized. One may gamble, pay his gambling debts, play again upon the next day, be ruined by the game and be thoroughly ruined. If justice does not compel the loser to

pay, no more does it compel the winner to make restitution. The violation of public order sometimes arouses the intervention of authority; in other instances, it is simply sanctioned by the complete abstinence, on the part of all authority, from any interference.

An act contrary to public order can be classified neither by means of its definition nor its sanction; accordingly it escapes all formal logic and would be a mythical conception for the person who did not account for it. In trying to explain the juridically irrational by juridical principles, the old systems of legal philosophy did not recognize its philosophical nature. The more modern systems which make an appeal to sentiment when logic is lacking are no better grounded.

Irrational intellectuality is one of the most fruitful sources of the law. In my opinion, it is certain that the legal philosophy of the future will find there its most substantial bases.

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CHAPTER X

THE RATIONAL ELEMENT IN LAW

A. ANALYSIS; B. DEFINITION

§ 1. INTRODUCTION: THE SIMPLE RATIONAL

A. Analysis

§ 2. ANALYSIS: I: LEGAL PROCEDURE; II: CONCRETE AND ABSTRACT ANALYSIS; III: LOGICAL VALUE OF LEGAL ANALYSIS. —
§ 3. THE BROCARD: I: DEFINITION AND FORM OF THE BROCARD; II: CLASSIFICATION OF BROCARDS; III: HISTORICAL IMPORTANCE OF THE BROCARD; IV: RÔLE AND LOGICAL VALUE OF THE BROCARD.

B. Definition

§ 4. DEFINITION: I: DIFFERENT KINDS; II: HISTORY; III: LOGICAL VALUE.

A. Analysis

§ 1. *The Simple Rational.* The "diseases of thought," just discussed, are aberrations of the intelligence, — intellectual processes which are unreasonable or irrational. But there are other intellectual processes which are rational, that is reasonable, without being, properly speaking, "logical" or, still less, scientific. The latter we shall term "the simple rational."

When Galen says "Yes" and Hippocrates "No," one of them must be mistaken, for they affirm or deny facts of physical nature which exist or do not exist. To acknowledge one to be right is to acknowledge the other to be wrong. But when Proculus says "Yes" and Sabinus "No," or when any two jurists whatever contradict each other, they may both be right. It is possible that the argumentation of one may be as concise, as well conducted and as thorough as that of the other, in which case the two

opinions are equally reasonable. For there is no objective fact which can serve to appraise their opinions. Thus it is, nearly always at least, in practical life. One may speak, write, or act very sensibly and after due reflection in very different ways. Life very seldom presents logical problems; yet it is a series of rational problems.

The logical problem admits of but one solution. If it is well conducted, it necessarily ends in a relative or an absolute truth, but in only one truth. The rational problem nearly always admits of several solutions. Operations of rational intellectuality are never strictly settled and fluctuate somewhat by chance. Nevertheless in many instances they necessitate intense and sustained cerebral labor. "The simple rational" is not a thought of a lower order than the purely logical thought. It may be much more complex. But it is a different thing, and the two must not be confused.

There is no mental discipline which furnishes as much exercise for the reason as does the Law; there is perhaps none which contains as rich and as varied processes of argumentation. Law has perhaps done much more for the development of the human brain than any other science. But generally Law does not attain logic properly so called. Its favorite domain is the reason, the simple rational. I do not say that it cannot go beyond this stage and attain pure and even scientific logic. But if it does this, it is only in exceptional instances.

In this chapter we are going to study some of the rational operations which have done their part in the development of the law.

§ 2. *Analysis.* If one compares the progress of a lawsuit, even in a very primitive society, with an ordinary discussion, even in a very cultivated society, one is struck by the order which characterizes the legal discussion and the incoherence which characterizes every other discussion. The polemics of the press and parliamentary

discussions ordinarily take place between highly educated persons, who know how to speak and write and who are often not lacking in legal training. Is it an exaggeration to say that they confuse the questions instead of clarifying them? Leaving no stone unturned, the opponents, not without malice, accumulate the most varied charges, bring up the most unexpected arguments, pile up the most inaccurate denials and affirmations, thus deafening those whom they have chosen as judges and rendering them utterly incapable of forming a reasonable opinion.

I: *Analysis and Legal Procedure.* Before the birth of law, family and tribal quarrels were surely no better conducted. One may easily imagine an unfortunate petty chief assailed by the clamors of two adversaries, each surrounded by his followers, and hurling accusations and charges against the other, all the while begging or even threatening the king, in order to gain his support. In the midst of such chaos, there is no way of knowing where you are. To organize this chaos, there is a single means: order, that is to say, analysis.

We may believe that the law sprang into being at the exact moment when the ruler was able to say to the parties, "Do not all speak at the same time";¹ "Now be quiet, and listen."^{1, 2} "The priests command silence."³ He may have added, "Both of you give up the disputed object."⁴ "Both of you release the man."⁵ And then, "Do not speak of everything at once." "Make but one accusation at a time." "Answer his accusation directly and do not yourself accuse." "Answer frankly by Yes or No." "Do not bring into the case old suits

¹ "Or faites paix, si escoutez."

² "Wellet ir nû gedagen,
Swigen und hoeren sagen."

³ "Silentium per sacerdotes imperatur."

⁴ "Lâchez tous deux l'objet disputé."

⁵ "Mittite ambo hominem."

that have already been judged." And these various prescriptions illustrate the essentially analytic character of ancient laws.

We do not purport, be it understood, to give even an approximate description of what actually took place. It may be that these principles of organization were due in but small measure to royal initiative, and that the primitive groups developed some elements of the judiciary organization through their own administration. Especially may it have been the case that the religious power was the first organizer of lawsuits, and that the precision of religious or magical formulas determined the precision of juridical analysis. It is none the less certain that the direction of lawsuits passed from the priest to the king, who scrupulously followed the old methods, which alone were capable of resulting in a true organization of justice.

The rôle of analysis in the development of the law has been wonderfully worked out by Jhering, in his "*Geist des römischen Rechts*." This part of his work is as ingenious as substantial, and every history of juridical logic ought to draw inspiration from it. The famous expression, "the alphabet of the law," is a godsend; nor is it the only one.

He makes a very happy distinction between concrete and abstract analysis. Concrete analysis is almost of a dramatic character, at least at the beginning. The procedure of the trial is already analysis. It is, in any case, the indispensable condition of every analysis. Procedure is nothing other than the art of adapting a claim to the policy of a given tribunal. The great principles of court organization and procedure are analytic principles.

This is true as regards jurisdiction. The complaint must be brought before one judge, and that a given judge. "Do not strike with two rods, nor dispute with two judges," says an Abyssinian proverb.¹ And it adds. "Even if you know everything, do not dispute with the

¹ Pailovitch, ed. Geuthier.

judge." Thus the rôles, confused in the beginning, have become clearly defined. The judge decides the question and the parties must submit to his decision.

The principle of "*res judicata*," excluding from the present complaint every claim or grievance already examined, is an important gain of juridical analysis over human nature, which forgets nothing nor ever pardons. In practical life everyone cherishes carefully in the bottom of his heart every reproach which he may address to his opponents and even to his friends in case of a quarrel or a discussion. Primitive procedures, even more than those of modern times, freed legal quarrels from this mass of spite, through need of order if not for the sake of generosity. And how superior is juridical thought to ordinary thought, which the purest and most poetic systems of morality scarcely succeed in influencing!

Primitive judiciary discipline imposes upon the plaintiff extreme precision in the announcement of his claims. He is to bring forward but a single grievance, to base his claim upon a single principle of the law, to claim but one object, and to express himself in such a way that first the defendant, then the judge, can determine by a simple "Yes," or "No," whether or not the claim is justified.

It is required of the defendant that he answer by a simple negative, that he raise no new questions, that he set not himself up as plaintiff on another score, nor seek to escape the charges which are directed against him by re-criminating his opponent in his turn. Counterclaim, set-off, and sometimes even plea, are denied him. It is true that he may not always be prohibited from pleading certain facts, suppressed by his opponent, which are of a nature to free him. From this arises a mechanism of procedure that is rather subtle and variable, according to the legal system, which seeks to supply the defects of the primitive, rudimentary and practical analysis by more refined analysis.

Concrete analysis governs the drawing up of instruments. This extra-judiciary procedure, designed to fix the law and in case of a suit to base it on justice, ought to harmonize more or less with the judiciary procedure.

When it enters upon the study of abstract analysis, Jhering's exposition no longer presents the same lucidity. It even seems to us that at times he wanders entirely from his subject. Certain ingenious views which he presents to us, notably those upon the exercise of power by functionaries irregularly appointed, seem to have no connection with the question.

II: *Concrete Analysis and Abstract Analysis.* We may say then that, according to Jhering, the analysis made in procedure and in the drawing up of legal instruments is a concrete analysis; but still it behooves us to state precisely in what sense this is true. It is a concrete analysis through the discipline imposed upon the parties to formulate their complaints or create legal relations between them. This spirit of analysis is manifested in the multiplicity and order of the ceremonies, the gestures and the words assigned to each party, and the number or the form of the documents, all of which are concrete and dramatic acts. But the picturesque proceedings of the old civilizations are capable of interpreting very subtle distinctions of the abstract juridical mind. In distinguishing the contract of sale from the transfer of property which is its rational consequence, there is imposed upon the parties two distinct ceremonies which will take place under two different forms and before two different publics. But these two concrete acts express the distinction between real and personal rights, a distinction which is extremely subtle and which constitutes one of the most important principles of juridical abstraction.

Accordingly, if one wishes to be absolutely precise, the following distinctions must be made:

(a) Purely concrete juridical analysis. This imposes a dramatic division, but not a division of the corresponding juridical concepts. For instance, the requirement that the parties speak in turn, and a separate complaint be entered for every object claimed.

(b) Purely abstract analysis, a purely intellectual division of juridical concepts without concrete translation in the procedure or the form of the actions. Such is the work of the judge, in systems where disputes are presented to him in a complex form and where they must be separated into their elements.

(c) Juridical analysis with both concrete and abstract aspects, of which we have already given examples.

Now in this last type sometimes dramatic separation has preceded and caused the abstract distinction, and sometimes the reverse is the case. The juridical analysis performed by the authorities and their representatives often presents a more concrete character; the juridical abstraction performed by the individual or his representatives, a more abstract character; that is to say, that one side starts from the concrete in order to attain the abstract; the other, from the abstract in order to attain the concrete. When the sovereign power concerns itself with organization, it takes care to dictate to the parties the conduct which they must observe, and its orders are formulated under a precise and concrete form. But since the sovereign power cannot be argued with, and since one cannot escape the penalty of the law, it is the individual who is anxious to set himself right with it. He needs abstract analysis in order to be able to examine the situation and understand what is the order of the king decreed for such a case. Thus the banker who installs his iron gratings with inscriptions upon them performs an operation of concrete analysis, and the patron who asks himself to what grating he must apply for any specified transaction, performs an operation of abstract

analysis. The two taken together form a complete analysis.

Of course, in our times no one is supposed to be ignorant of the law and there is no need for the sovereign power to explain its wishes. That is the affair of the public. The modern jurisconsult works for the public and not for the sovereign power, which has no need of his assistance to make itself obeyed. But when the sovereign power is weak, it needs the jurisconsult to advise it how to govern its subjects and accordingly the jurisconsult works for the sovereign power.

III: *The Logical Value of Juridical Analysis*. The services which juridical analysis has rendered humanity are incalculable. It has been the most potent factor in the development of thought. No civilization could have arisen without it. How may we recognize the twelfth, thirteenth and fourteenth centuries? By their jurists and by their architects. The work of architects is within reach of all; the work of the jurists is accessible to but a small number. Nevertheless both are broad in compass and extremely delicate in workmanship. While the architect dominated the æsthetic life, the jurist was the sole master of the intellectual life. In the sixteenth century, law gave its aid to theology and philosophy, and these doctrines are best known to us and the most alive. As for the degree of intellectual power which they were able to develop, I am not certain that they were superior to juridical education, — the education due to juridical analysis.

Juridical analysis possesses this incomparable educational value because it is an extremely delicate operation, which demands a general activity of the mind and makes an appeal to the creative faculties as well as to the critical and deductive faculties and the faculties of observation.

Nevertheless we do not hesitate to place juridical analysis outside of the pale of logic properly so called; for in our opinion logic must be a necessary operation of the

intellect, a work which must perforce be conducted in a certain way and in no other. Now, one and the same legal relation may be analyzed by several methods. There are certain more familiar methods of dissecting juridical matter, but there are others equally legitimate, which may take us by surprise for a moment. But since everyone wishes to have a hand in the process of dissection, we are obliged to recognize the fact that the spirit of analysis in itself, freed from every prejudice, can approve several solutions of the same problem.

§ 3. *The Brocard.* Whoever, through prejudice, should neglect the brocard would understand but little of the real mechanism of juridical thought. Primitive and advanced, theoretical and practical, systems of law are partial to these brief formulas which carry with them stronger conviction than do long treatises. The modern public at large knows nothing of the law except a few brocards, which are often little understood. The peoples of ancient times often held in memory a rich store of these. Mixed up with proverbs upon good and bad weather, the conduct of life, morality, etc., they formed the basis of their intellectual wealth. This wisdom of the ancients has given us a large part of statutory law; and, however scientific our modern interpreters of laws claim to be, it seems to me that juridical practice cannot dispense with it for a long time.

I: *Definition and Form of the Brocard.* But what are brocards? They may also be termed proverbs, sentences, adages, maxims, aphorisms, juridical rules, precepts, and notabilia. All of these expressions are not synonymous; but they are so based one upon the other that no precise distinction which might be used for the purpose of classification can be made. The brocard is a principle which claims to be indisputable. It is presented as a juridical axiom, although it is rarely of this character. Its logical value is very variable, often negligible; which

fact, however, does not prevent it from exercising decisive authority in its own sphere. This authority the brocard very often owes in large part to its form, that is, to its conciseness or alliteration.

The imperative is always concise; for this reason, the concise has the manner of an imperative. A sharp, crisp assertion dissipates every idea of discussion and even of reflection. But such, however, is not the form most used. The juridical proverb wishes to be convincing rather than imposing. It insinuates itself into the mind through qualities of symmetry and harmony, which human psychology easily confuses with reason. The brocard is composed of two phrases which mutually bolster up and sustain each other by the repetition of the same syllables and the same words, or by an accordance of their terminations. Everybody knows that a good proverb must rhyme to be apt. This is also true of a good juridical proverb. But it will have even more force through alliteration or the repetition of words. If it possesses at the same time rhyme, alliteration, and repetition, nothing more is to be desired.

It must not be imagined that these special forms have as their principal or sole "*raison d'être*" to engrave themselves upon the memory. Their principal "*raison d'être*" is to convince. Their power of conviction has lost nothing in our modern psychology. If one examines minutely the speeches or writings of the grandiloquent orator or journalist, alliteration and repetition of words will be frequently encountered. As an example: "General ideas are generous ideas"; here is a thought which is not very old and which even aside from its alliterative form is worthy of admiration. If one had confined oneself to saying, "General ideas are good or beneficent," would anyone have taken the trouble to preserve that phrase? There is a saying as banal as it is modern, which expresses, moreover, the philosophy of alliteration: "Saint and simpleton

begin with the same letter";¹ here there is an implication that things which begin with the same letter stand a chance of resembling one another.

It is perhaps not necessary to give examples, as the store of juridical sayings is very rich and within the reach of all. Nevertheless, let us cite some typical forms borrowed here and there.

Alliterative proverbs:

- "The greater the right,
The greater the wrong."²
- "No free man without a freeholding."³
- "Leave land and leet
To save thy life."⁴
- "What's food for fire's maw
Is a chattel in law."⁵
- "Manner masters matter."⁶

In the following sayings,

- "Settling the title of the donor
Settles the title of the donee."⁷
- "Power to do the greater
Is power to do the less."⁸
- "Inclusion of the one is
Exclusion of the other."⁹
- "The vote of one is
The vote of none,"¹⁰

the repetition, the parallelism of the terms joined with the rhyme, and the assonance, contribute to the popularity of the proverbs.

¹ "Bon et bête commencent par la même lettre."

² "Summum jus, summa injuria."

³ "Nemo liberalis, nisi liberatus."

⁴ "Land ende liod rêma ende sîn lîf helpa."

⁵ "Was der fackel verzehrt, ist farnis."

⁶ "La forme emporte le fond."

⁷ "Resoluto jure dantis,
Resolvitur jus accipientis."

⁸ "Qui potest et majus,
Potest et minus."

⁹ "Inclusio unius,
Exclusio alterius."

¹⁰ "Voix d'un,
Voix de nun."

Brocards in simple rhyme are legion, even in many languages which do not ordinarily use rhyme in poetry. Sometimes the rhythm of the phrase, conformity to certain rules of prosody, or even its singing measure although in a prose form, informs us that a brocard is before us.

We must not overlook the picturesque saying which, regardless of form, obtrudes itself upon the attention by reason of an especially apt or amusing comparison:

"Oxen are bound by their horns, and men by their words."¹

"The foot gives seisin to the head."²

"When the thicket touches the knight's spurs,
The serf loses his right."³

In popular laws, brocards nearly always appear under one of these forms, which renders them familiar to all and confers upon them as much authority as popularity. More learned laws are more prosaic. To a public which wishes to appear serious and is even not afraid of being bored, the old forms do not appear to have the necessary gravity. The brocard then is a phrase which is not distinguished from any other phrase except that it is repeated more often and is sometimes quite concise:

"No defeasance without express words."⁴

"The place gives the law for the act."⁵

If it loses its clearly defined form, or becomes complicated with incidents or indirect propositions, the brocard is no longer a brocard. Interpreted by a heavy pen, the

¹ "On lie les bœufs par les cornes
et les hommes par les paroles."

² "Le pied saisit le chef."

³ "Wenn der Busch geht Reiter an die Sporen,
So hat der Unterthan sein Recht verloren."

⁴ "Pas de nullité sans texte."

⁵ "Locus regit actum."

whole thought collapses into juridical prose, where the mind can no longer discover it except by wearisome exertion. Thus in the old popular law usages, the form of partitioning of property was expressed in these sayings:

"The elder divides, the younger chooses,"¹

but in a dogmatic form:

"It is to be known that if there are two brothers, and, according to law, the younger divides, the elder always has the right to choose, for thus no unfairness can be charged."²

Aside from the disagreement as to the rôle of the two brothers, the two forms, although they have almost the same meaning, are very different in the power and extent of their action.

II: *Classification of Brocards.* From the point of view of subject matter, the proposition which constitutes a brocard always purports to express a self-evident or an almost self-evident truth. But this self-evidence is not always of the same nature. If the brocards are axioms, they are such through a variety of claims. They may be logical axioms, axioms drawn from moral or social life, axioms of juridical construction, axioms of obedience to custom, law or to the sovereign power, axioms based upon experience, and axioms based upon common sense. This classification does not claim to be complete, but to show how juridical conviction rests upon a number of bases. For if the brocard is not actually and absolutely an axiom, there is nothing in the law which approaches nearer to the axiom and which can better serve to establish in juridical discipline the idea of a self-evident proposition.

¹ "L'ainé lotit, le puine choisit." "Der Aeltere theilet, der Jungere kieset."

² "Sciendum est, si duo fratres fuerint, factis a minori portionibus secundum jus, major semper tenetur eligere, cum in hoc nulla malitia valeat inveniri." *Summa de legibus Normanniæ*, XXIV, 12.

(1) *Brocards Based upon Logic.* Certain juridical brocards are connected with general logic. They are true in the law because they would be equally true in every domain and particularly in that of dialectics. For example, these two from Gaius:

"The whole contains also the part."¹

"The special is always included in the general."²

Again, let us cite this well-known adage which is a translation from a Roman precept:

"Who can do more, can do less,"³

and that rule of mediæval juridical dialectics:

"Under universality come those things which are not embraced under generality."⁴

There are others which are corollaries of axioms not expressed and whose import passes beyond the juridical domain properly so-called. From the psychological nature of the will, Roman jurisconsults have thus deduced these two rules:

"He who can will, can refuse."⁵

"He is not considered to will who obeys the command of a father or a master."⁶

(2) *Brocards Based on Moral or Social Considerations.* In every age, a great number of precepts are inspired by moral considerations. Some are direct productions, others are extracts from older texts. They are always presented as self-evident principles of morality. Thus one might

¹ "In toto et pars continetur."

² "Semper specialia generalibus insunt."

³ "Qui peut le plus, peut le moins."

⁴ "Sub universitate veniunt quæ non comprehenduntur sub generalitate."

⁵ "Ejus est nolle, qui potest velle."

⁶ "Velle non creditur,
qui imperio patris vel domini obsequitur."

gather a great number based upon the protection of the weak, of women, of widows and of orphans:

"Widows and children are the wards of the church." ¹

"The ruler who ought to rule his whole people, ought to rule and protect the orphan even more faithfully." ²

"The law excuses woman in her ignorance." ³

More practical but of a similar nature, this precept:

"It is well not to disturb land about to be ploughed." ⁴

Of a canonical flavor, although based upon Roman texts:

"Poverty pays with an excuse." ⁵

"You can well yield to the will of a parent." ⁶

"Do not add further affliction to the afflicted." ⁷

A principle of general equity and hence of morality, this regulation from Gaius:

"Good faith does not allow the same thing to be exacted twice." ⁸

(3) *Brocards Base upon Juridical Principle.* These brocards are not based upon dialectic inference nor moral inference, but upon juridical inference. They rest upon this idea, that every legal concept presents, side by side with its arbitrary and accidental characteristics, others which are permanent and belong to it naturally. Thus we distinguish in every juridical concept its essence, its

¹ "Viduæ et pupilli sunt in protectione ecclesiæ."

² "Dux qui totum suum debet regere populum, orphanum fidelius debet regere et servare."

³ "Das Recht entschuldigt das Weib in der Unwissenheit."

⁴ "Utile est araturam non disturbare."

⁵ "Paupertas tribuit excusationem."

⁶ "Recedi posse a voluntate parentis."

⁷ "Afflicto non addenda est ulterior afflictio."

⁸ "Bona fides non patitur
Ut bis idem exigatur."

nature, and its accidental qualities. These distinctions are, be it understood, purely subjective, and what appears natural to one may not seem so to another.

For Ulpian there was "nothing more natural than to use the same form in the creation and the extinction of obligations."¹

Yet institutions of the "jus civile" generally appeared less natural and furnished fewer brocards to the Roman jurists than did the institutions of the "jus gentium." Thus Paulus writes: "That is owed by nature, which ought to be granted by the law of nations."² From which springs, "By nature is due that which by nature it is just should be paid,"³ a formula vague enough to lend itself to numberless applications.

It is a juridical inference which the French Court of Cassation invokes in a decree of February 19, 1819:

"Whereas it is a maxim of all times and all places that the moment of death determines the status of creditors and of the goods of the deceased, and that accordingly it is not in the power of the ordinary creditors of an estate to be changed into mortgage creditors. . . ."

Brocards of this nature are numerous. Among them, may be cited principles which, although enunciated for particular cases, were found to possess a rational force great enough to pass far beyond the original field of application and become general principles.

Thus the Rhodian law of jettison distributes among all the merchants who had cargoes of merchandise upon a ship, the loss of that part which had to be thrown into the water to save the rest. The principle, "That is to be made good by the contributions of all which was expended for the benefit of all,"⁴ has passed beyond the bounds of

¹ "Nihil tam naturale est quam eo genere quidque dissolvere quam colligatum est."

² "Is natura debet, quem jure gentium dare oportet."

³ "Natura debetur id quod natura æquum est solvi."

⁴ "Omnium contributione sarcietur quod pro omnibus expensum est."

maritime law and become a juridical axiom of general application.¹

(4) *Brocards Based on the Interpretation of Laws and Juridical Acts.* Brocards on the interpretation of laws and legal transactions derive their authority from dialectic and juridical inference. These are very numerous. We may cite one from old Quintus Mucius Scaevola:

"Provisions in a testament written so that they cannot be understood are the same as if not written,"²

which may seem at first sight simply a common-sense truth. In reality, the ancient jurist waives aside with a somewhat Roman brutality the pious scruples of certain judges who believed that they were constrained to discover the thought of the deceased in a maze of the most enigmatical terms.

Brocards of interpretation are very numerous in every digest. In our old laws, there are some that are popular:

"The best one to explain a writer's words is the writer himself";³

and others learned, with a scholastic flavor:

"An indefinite expression presumptively includes the future."⁴

"Many things are accepted by way of deduction which otherwise would not be conceded."⁵

(5) *Brocards Based upon Custom.* There are brocards which have a positive rather than a rational character. True in one country, they may be false in another. Certain customs produced the adage, "No lord without land,"

¹ Leyser, III, p. 143.

² "Quæ in testamento ita sunt scripta ut intelligi non possunt perinde sunt ac si scripta non essent."

³ "Ein jeder ist seiner Worte bester Ausleger."

⁴ "Locutio indiffinitiva regulariter extenditur ad futura."

⁵ "Admittuntur multa per consequentiam, quæ alias non concederentur."

to which others reply, "No land without a lord." Certain legal systems affirm quite as energetically, "Sale takes precedence over rent," as others, "Rent takes precedence over sale."

A juridical principle thus formulated is not presented as being of a necessary character, nor even as rationally preferable to the contrary principle. It is offered as indisputable in positive law, before a given tribunal. It is based upon the authority of custom, of law, and it is by virtue of this that it may be called a brocard. "In the tribunal of matrimony, the worse prevails over the better," says Loysel. This adage, widespread in countries where customary law was prevalent, and giving as it did in case of marriage between free person and serf the most unfavorable solution, was based only upon the authority of custom.

(6) *Brocards Based upon Common Sense and Experience.* Finally, others emanate from the common sense of the people. They address themselves to individuals in order to give them advice upon what they ought to think of the law, of lawsuits, or of any specific institution or situation. Often gently ironic, sometimes frankly satiric, they are truths of experience which often bear much weight with individuals.

"The husband cannot arise too early in the morning to sell the property of his wife," is a criticism of the régime of community as it has fulfilled its functions for some time in France.

In monastic orders and in certain political and judiciary assemblies the principle of the vote and of the majority is introduced:

"The majority rules."¹

"All royal birds follow one flying ahead with winged feet."²

¹ "Das mehr gilt."

² "Aves regales unum prævolantem alatis pædibus consequuntur omnes."

Of the same kind:

"Community breeds disputes."¹

"To go surety is to go broke."²

"He is a fool who consents to be tried by inquest; for the greater the goss p the surer the verdict."³

"A friend when you lend

Is your foe when you demand."⁴

Adages of this kind abound in common law. Roman law has transmitted hardly any; that is well known. Nevertheless, the following propositions may be considered truths of common sense and experience rather than juridical adages:

"It is worth less to have the suit than the property."⁵

"There is more surety in a thing than in a person."⁶

"A thing is worth as much as it can be sold for."⁷

We have not tried to make a strict classification of these formulas, which are of an extremely varied and indefinite nature. Moreover, a brocard may change its meaning according to circumstances. Our tentative grouping abundantly suffices, however, to prove that if brocards have appeared true and self-evident, it is for different reasons and because they have been based upon different authorities. If the brocard has played the same part in law that the axiom has in the sciences, the establishment of this fact is far from being devoid of importance for the history of juridical thought.

III: *Historical Importance of the Brocard.* Those who have been close students of primitive civilizations believe

¹ "Communio parit rixas."

² "Bürgen soll man würgen."

³ "Fol est qui se mest en enquête. Car qui mieux abreuve mieux preuve."

⁴ "Au prêteur ami,
Au rendre ennemi."

⁵ "Minus est actionem habere quam rem."

⁶ "Plus cautionis in re est quam in persona."

⁷ "Res tantum valet, quantum vendi potest."

that the law was shaped in the form of very short precepts, which were committed to memory and handed down from individual to individual through generations. Their form is, so to speak, unchangeable, for the law texts were very often religious decisions of a sacred character. It was thought that by altering the form the substance would be altered. Among peoples somewhat more juridically developed but making little or no use of writing, certain persons made a specialty of the study of precepts and spent their lives in learning and studying the law. Numerous works have resurrected for us these early judiciary customs of the most varied peoples.

But it may be asked whether or not primitive juridical precepts are brocards, and as the notion of the brocard is quite vague, the question is not altogether an easy one to answer. However, it seems that, even in these distant periods, a certain dualism is observable in the nature of the various precepts which constitute the law. Some are orders or interdictions couched in imperative or prohibitory terms, directed toward a specific act and using appropriate and positive expressions. For instance, "The killing of a vulture is forbidden," "To work upon such a day of the week is forbidden," etc. Others, on the contrary, do not give any direct order, but establish under an often imaginary form legal truths of a more general order. Thus, according to Post, it is said among the Bogos, "Woman is a hyena," to express that she has no juridical capacity. Accordingly, one might trace back to the same sources the distinction between positive, systematic law and emblematical, axiomatic law.

But as soon as the law became written, the early precepts in their entirety, or almost so, were incorporated into the text. Others became thus incorporated only accidentally and seldom with method and completeness. Their transmission became all the more difficult as juridical writing multiplied; and after some centuries, legal

proverbs became changed and were lost so that they could no longer be reestablished.

Thus, although the imperative precepts of the Roman law of the Twelve Tables have come down to us, at least in part, their numerous contemporaneous juridical proverbs are almost unknown.

Nevertheless, the Roman jurists of the classic age did not disdain to gather old brocards, perhaps even to comment upon them. The oldest of the legal masters, Q. Mucius Scævola, is known especially for his "*Liber Singularis ὁρων*," of which some fragments remain to us. Gaius, Paulus, Ulpian, Pomponius, Modestinus, etc., jurists who were engaged both in teaching and practice, and others engaged only in practice, made collections of "*regulæ*," which to a great extent may be considered brocards, adages, or juridical proverbs.

For teaching purposes, the collections were generally gathered together in a single book ("*liber singularis regularum*"). These formed the counterpart of the "*libri institutionum*" which represented positive and dogmatic law. For practical purposes, the collections of adages were more voluminous. They constituted as many as fifteen volumes, and the same writers who compiled a "*liber singularis regularum*" for the use of their pupils, also made more complete collections for the use of practitioners.

For all that, they form a very small part of the *Pandects*. After the compilers had exhausted the various juridical subjects, they felt it their duty to add a heading devoted to brocards — "*de diversis regulis juris antiqui*" — which were, moreover, except for a small part, simply borrowed from the collections of the ancient "*regulæ*." These old collections were utilized somewhat at haphazard, but, it seems, rather sparingly in all the books of the *Digest*.

We should have known perhaps little more of the old

German and common law proverbs had not the interest in archæology and the taste for the picturesque exercised their ingenuity to discover them. The purely juridical writings would have allowed them to sink into oblivion.

The juridical life of the Germans at the time of their invasions certainly could not have been devoid of proverbs. Therefore one may be astonished to find so few traces of them in the "*Leges Barbarorum*." Certain of these laws are not lacking in vigor of style, but everything about them is prosaic and lacks the imperative quality. The Salic Law is a body of propositions regarding regulations, pure and simple; the laws of the Visigoths and Burgundians enable us still less to divine the picturesqueness and the fancifulness of the formulas which were exchanged in their judiciary assemblies.¹

Legislative or even didactic writings assimilate to a very limited extent the adages of everyday life; these are turned over to practitioners with the belief that they will not forget them. Such is the case in the customary law of European countries. The customary laws of the twelfth and thirteenth centuries are certainly living works, free from all scholasticism, and from any too systematic plan, or dryness of form. However, Beaumanoir, Pierre de Fontaines, the Custumal of Normandy, or the Assize of Jerusalem, uses juridical sayings scarcely at all. Nor are they to be discovered more often in the statutes of towns, the more ancient custumals, or the legal texts of a practice-genial book. Nevertheless, it is very certain that the thousand proverbs which Loysel gathered together in his genial treatise were already in use, and that, if certain of them are more recent, a number of others have been forgotten. Although the "*Sachsenspiegel*" is sometimes quite full of imagery, it seldom alludes to the several thousands of proverbs which were sought out and brought to light in the nineteenth century.

¹ Cf. Dernburg, *Die Phantasie im Recht*.

Yet how is it that Romanists of the same 1200s and 1300s, and even earlier, sought especially to extract from the texts of Justinian the brocards for which they were so hungry? In manuscripts with the oldest glosses, the "notabilia" hold the place of honor. When the interpreter can find in a text a very general principle, he tries to sum it up in a few words, to give it the form of a proverb which he inscribes in a prominent place, often embellishing it in order better to attract the attention. It may be affirmed without fear, in view of pre-Accursian glosses, that the seekers after brocards were among the most ancient and most zealous annotators of Justinian; and we may even go so far as to say that if the law were to be proclaimed written reason, it would be due to the multitude of juridical, logical and philosophical proverbs which may easily be extracted from its texts.¹ The heading of the Pandects "de regulis juris" is the first to be commented upon in a methodical and coherent fashion, more particularly in the course of the twelfth century. Later, it was perceived that general principles could be discovered quite as well in all the other headings. Pillius is handed down to us as having made the first collection of brocards; but there were others at much more remote periods, perhaps before the school of Bologna. In any case, his example was followed by the majority of the great glossators. Besides, we know that to extract principles, "brocardizare," was one of the routine exercises in the teaching of the Romanists of the Middle Ages.

We may summarize with certainty this picture of the juridical life of the Middle Ages: The common law authors neglected the brocard, the Romanists were eager in their search for them.

Moreover, the explanation is simple: Every one seeks what he lacks. Juridical proverbs in the language of the people were so well-known and widespread in practice

¹ Cf. the frequency of Latin maxims in Coke.

that a Beaumanoir, a Jean d'Ibelin, and an Eike von Repgau thought it useless to reproduce them. Common law was lacking in dogmatic and systematic works; and it was to fill this gap that they labored. Roman law was very well supplied in this respect; but if its expounders had not been able to launch into practice as many and more adages than the popular law possessed, it would never have been able to acquire the degree of popularity necessary to success.

It is very evident from history that the axiomatic thought expressed by the brocard has always shared in the development of the law. Ought it to disappear before more learned methods? That is of small importance to us, since we are concerned with history, that is to say, with the past. Nevertheless let us note that the brocard is very much alive. One of the most learned counsellors of the French Court of Cassation attaches great importance to it. He has taken great pains to collect a certain number which he recommends strongly for the study of young magistrates.

IV: *The Rôle and the Logical Value of the Brocard.* It is with juridical proverbs as with other proverbs. Some are purely fanciful and superficial, while others condense much wisdom and reflection. The unfortunate thing is that it is very difficult to distinguish the two. For it could be done only by recommencing the intellectual or experimental labor already accomplished, and the "raison d'être" of the proverb is just to save us that labor. The brocard is not made to be discussed and criticized. It is the weapon of rapid and popular discussion, which in order to act upon the masses must be employed without too many scruples.

The most elementary juridical rules are only approximate; that is to say, they admit of exceptions. Now the principle gains in logical value when exceptions are driven out. To speak correctly, it becomes truly a prin-

ciple only when all possible exceptions can be enumerated. This is not always easy; but it is not allowable for the logician to dispense with it, and this is why the legal scholar will always be the object of suspicion in the eyes of the public at large. To enunciate a precise and definite rule, but to add that in a certain case and then in another and later in still another case, it ought not be applied, is to awaken a distrust which is easily understood without being justified. In the struggle between Roman and common law in the Middle Ages, the former suffered under this disadvantage. By virtue of a very old tradition, which antedates the School of Bologna, the Romanists always gave the rule with its exceptions, the "*regula cum suis fallentiis*." Thus, to cite a very old fragment published long ago by Pitting, the rule, "The profit should be his who runs the risk," is immediately limited in its applications thus, "at least for property owned or found, though not for property wrongfully detained," etc.¹ From this fragment (without doubt of the eleventh century) down to the collection of Socinus (the sixteenth century) the jurist accompanies his brocards with exceptions, the "*casus fallentiales*," exceptional cases, which they do not include.

Thus presented, the "*regulæ*" had for the public at large the appearance of being traps, which could scarcely render them popular. Jurists would have had to exercise much skill and authority to triumph over this difficulty.

Moreover, it was very seldom that one could determine accurately all the exceptions which any juridical rule permitted; and when a new and improved exception presented itself, any confidence which a collection of "*fallentia*" might inspire was greatly shaken. Had it not promised to trace every principle to its most precise meaning, and

¹ "*Commodum esse debet, cujus et periculum est, ... in re tamen propria et in re inventa, non in re aliena ab alio detenta.*"

had it not failed in this promise by allowing an unforeseen hypothesis to escape him?

It may be laid down in general that the brocard has this triple inconvenience:

(a) Its logical value is extremely variable, and this value in nowise influences its juridical prestige.

(b) It loses in authority and efficacy in proportion as it gains in exactness. It arouses mistrust or aversion when it is too loaded down with considerations which recall to its true value.

(c) Finally, the brocard is never an axiom, a truth which does not need to be demonstrated. It is impossible to affirm that it never admits of exceptions. It is not an axiom in logic.

But criticism must not be exaggerated. If the juridical proverb does not belong in logic, it is nevertheless an element in reasonable thought. It forms a part of rational intellectuality, that sphere of practical life which does not bring any certainty with it, but is, notwithstanding, the product of very sane thought. The brocard may be disputed; but it may be defended. It is "reason," the ingenious but not infallible guide which should never forget to be prudent.

The brocard is not a logical axiom; it is a rational axiom.

B. Definition

§ 4. *Definition.* It is a very commonplace truth that before discussing anything, it is well to define the object of the discussion. Without this elementary precaution, the disputants run the risk of talking a great deal without advancing a single step, and of tearing out each others' hair when as a matter of fact they really agree. This is universally known, but seldom taken into account, at least in practical life.

In juridical life, definitions were for long periods dis-

pensed with. Even some highly developed and subtle legal works presuppose that everybody knows what they are talking about, and give no explanation of the most complex ideas. In other periods, quite the contrary, the definition dominates juridical science. It is discovered in the writings of the legislator and the judge as well as in those of the jurist. Its function is no longer simply to clarify debate. It has become an active factor in the formation of law. It suggests to legal practice solutions which appear incontestable. It directs the progress of the law, and it is in this sphere of its usefulness that we shall study it here. Definition is an intellectual and rational force in juridical development. We wish to discover its logical value.

I: *Different Kinds of Definitions.* Philosophical and dialectical geniuses of various temperaments have for centuries toiled over the theory of the definition. To cite even the most celebrated of them would be too long a task. But it must be remarked that the most widely divergent tendencies of human thought would be represented by them: method and precision as well as subtlety and critical profundity. The definition is held in honor in every domain of scientific and intellectual achievement. It would seem that after so much study and practical utilization, one would be able to submit an almost perfect definition of the definition.

Nevertheless, no one, we believe, has yet been able to give a correct definition of the definition. It seems that this basis of all method has not yet been stated methodically enough. The science of logic is far from having achieved its task; since, upon the most elementary of its conceptions, it offers us no complete system but only a great number of ideas of widely varying value and imperfectly established relations. The most thoroughly developed discourse upon the definition may have an appearance of simplicity, but to one who studies it closely, it

will soon be found to be nothing more than a number of unconnected ideas.

Such as it is, however, the theory of the definition in current Logic deserves to be closely studied by jurisconsults who are interested in abstract Law, and perhaps by others also. Does one not run the risk of living in a world of illusions when one takes as simple, easy and of absolute value, an extremely delicate intellectual operation which is performed every instant with the most unconscionable crudity?

In very diverse ages, jurists have gone to school to logicians and dialecticians for the intellectual advantage to be gained thereby. If an abuse of the application of logic to questions of concrete law is possible, there is no possibility of any such abuse of knowledge. If the subtlety of analysis is not always in place in practical life, it has a valuable function in the world of thought which without it could obtain only crude and false ideas. Moreover, by showing how delicate and complex may be that which at first sight appears very simple, it justifies prudent, practical, common sense, which hesitates before every trenchant assertion. Be that as it may, the essential problems concerning definition have not been solved, so far as I know. If it is not the business of the jurisconsult to solve them, he ought at least to understand them in order to appreciate the value of an instrument which he handles constantly.

(1) *Definitions of Words and of Things.* In principle, to define is to give the meaning of words, that is to establish a relationship between a thing and a sign. Thus the aim of every definition is to enable specified objects to be recognized by means of a word; consequently this definition becomes at the same time that of a word and that of a thing. The proposed distinction might to better advantage be termed subjective and objective definition.

As there exists between a word and a thing or an idea no necessary relation, every one has logically the right to create for himself a terminology according to his own fancy, to call "red" what others call "green," "good" what is "evil," to apply the word "marriage" to a definition of the testament, etc. It is very seldom, no doubt, that any one thus abuses himself without a motive in upsetting the meaning of words fixed by usage. But usage never gives to words a meaning which is strictly accurate. When there is need of precision in expression, everyone uses more or less this faculty of defining. The most ordinary words of everyday language never have so definite a meaning but that they may be understood differently by different persons. Book, table, chair, door, etc., may not express exactly the same thing for everybody. In the domain of abstraction, the unlimited right of everyone to choose his language is absolutely indispensable to the development of thought. Each new conception demands a new definition. One may use old verses for new subjects, but old definitions answer no purpose as regards new ideas. And even without any spirit of innovation whatever, abstract ideas especially in the domain of the moral sciences are so fluctuating that whoever wishes to use them must put forth personal effort to restrict their meaning.

Now logic informs us that when an individual inserts into a definition an element which is personal to himself, he makes a definition of a word (no matter how small may be the proportion of his initiative) so far as the fragment which he has introduced is concerned.

Definitions of words, or subjective definitions, are free, and always correct, provided the thing or idea which corresponds to the term is clearly indicated. But they are virgin of every attribute at the moment of their formulation and can acquire these attributes only by analysis, deduction or subsequent observation.

Definitions of things or objective definitions are not procured so cheap. They demand a preliminary labor in the form of observation of things just as they have been presented and of ideas just as they have been formulated. If this first labor is not performed with the most rigorous exactitude, the definition has no logical value whatever and should be discarded absolutely.

But by way of compensation, when an objective definition is successful, it is rich with all the past of experience and reflection, which may be considerable. A definition of the testament which I might make according to my fancy could easily be unassailable. But *a priori* and until its verification, no legislative disposition whatever can be explained by it. A definition of the testament such as it was conceived by all European peoples between any two particular dates will be much more difficult to establish. But once established, it may serve to interpret an indefinite number of documents. Thus the "pons asinorum" of the sophists is in the cleverness of wilfully and continually confusing the definition of words and that of things. They thus obtain for nothing that for which they should pay dear, and may attribute to a conception of their choice all sorts of properties to which it has no right.

Furthermore, such confusion is far from being always due to bad faith. The most conscientious thinker may easily be deceived in this respect. For the subjectivity or the objectivity of a proposition may be only partial and quite hidden. Very often the jurist who fashions definitions draws inspiration at the same time from a certain positive law, which he studies, from a more general law common to the civilized world at large, from definitions elaborated by other jurists, and from his own conceptions. As trifling as may be the lack of absolute agreement between its different elements, his work is logically incoherent without his suspecting it, and without any

one's suspecting it, even when he expresses himself with clearness and elegance.

The distinction between "definition of words" and "definition of things" raises, moreover, many other questions for juridical science which are more difficult and less understood; but to our great regret, we cannot touch upon them here.

(2) *Indicative and Descriptive Definitions.* When logicians enumerate the conditions of a good definition, the very sage counsels which they give in this respect are not always equally justified. A good definition is one which will fill its rôle properly. But is this rôle always the same? Far from it; it varies according to circumstances. Sometimes, it is required of a definition that it make the nicest possible distinction between a concrete object or an abstract idea and any other which might be confused with it. A certain and easy pointing out or indication is demanded of it. It matters little then whether or not this indication is intimately bound up with the nature of the object, or whether or not it is accidental. If it is precise, it fulfills its rôle of identification. To identify a man it is sufficient to know that he was the only person who passed upon any particular street at any particular hour, or that he wore any particular costume in any particular town. These accidental circumstances may be most valuable in distinguishing him from every other man.

If to the question, "What is a sale?" the answer is given, "It is the institution which is studied in the French Civil Code under the sixth heading of the third book," a definition excellent for purposes of identification has been given. It is an affirmative proposition the attribute of which pertains universally to that subject and to that subject alone.

This indication, nevertheless, is completely foreign to the idea itself. It gives no information upon either the essential or the accidental characteristics of the sale. It points out the proximate species, "French Civil Code,

Book III," and the specific difference, "heading six." It fulfills all the conditions required by logicians as far as precision is concerned. But in itself, it teaches absolutely nothing about the object defined. Many would hesitate perhaps to see in it a true definition.

On the other hand, the descriptive definition — sometimes called the "essential" definition — should make us recognize the essence of the object. But what is the "essence" of a thing? What is the "essence" of a juridical conception? A formidable problem, which we shall not touch upon but which it would be necessary nevertheless to have solved definitely, if we wished to bring to bear upon the nature of juridical definitions a judgment based on logic. In reality, we shall substitute for the word "essence," an expression less rigid but consequently more vague. The descriptive definition gives "the most salient characteristics" of an institution. The better one knows how to group these characteristics under a single form, the better one will have succeeded. That which in itself enables the defined object to be most easily recognized is the descriptive definition to be preferred, even when it is not precise enough to avoid confusion with institutions of secondary importance. Thus a definition of "testament" which might allow a confusion with the institution of contract might be a good one from the descriptive point of view, for the testamentary act is as a rule in much more common practice than the contract in contemplation of death.

(3) *Empirical and Genetic Definitions.* There may be condensed in a definition all the results of experience in relation to a given object. The broader the observation, the better the definition; and if the knowledge of the object is complete, the definition becomes perfect or absolute. The result of the empirical definition is to sum up the knowledge, but it cannot produce it. Nevertheless its objective and scientific character is incontestable.

The science of geometry enjoys a rare privilege. From the very beginning it can prove its figures in such a definitive manner that the most thorough and detailed study in nowise modifies its definitions. The work consists only in disengaging the infinite number of properties which necessarily result from the first formula, but which could not possibly have been perceived at the time the formula was stated. Thus the mere definition of the right-angled triangle necessarily involves the law of the square of the hypotenuse. Nevertheless, it is impossible to perceive this law without a series of subsequent deductions. These definitions are called, with good reason, genetic, because they contain the germs of an entire series of truths which could be developed from these same definitions. They are the domain of the most highly scientific thought.

Juridical science has known nothing similar up to this time. It must not be denied, however, that great efforts have been made and are still being made to adapt purely scientific methods to the law. To appreciate the value of these efforts, the distinction between the different kinds of definitions is of prime importance. We shall have occasion to insist upon this point later. But historically, what was the nature of the logical processes employed in the fashioning of our modern legal systems? This is what we are going to study.

II: *History of the Definition in Law.* The relations between juridical thought and definition have been very diverse. For a long time there was no connection between the two, and long-lived civilizations developed without determining the precise meaning of legal terms. Very bulky volumes on law, works which seem solidly based and logically coördinated, took no pains to define the highly complex and ambiguous words with which the text abounded.

At other eras of juridical thought, the definition is everything. This it is which furnishes irrefutable argu-

ments to practice. When it has spoken there is nothing further to be said. Every other just or practical consideration is but of secondary interest. It is in the definition that the decisive reason of the judgment is to be found. The opposition between the theoretical and the practical methods has never before, perhaps, been so evident as now. The faculty of defining is characteristic of mental culture if not of mental power.

(1) *Absence of Definition Among Primitive Peoples.* Primitive minds have no need of expressing clearly what they think, still less everything that they think. For them, the word is not yet the symbol of the idea. They are not yearning to disclose the intellectual labor which is taking place within them and from which they wish to derive the exclusive benefit. Besides, they do not grasp very clearly the relation between their intellectual activity and language. On the other hand, the "word" is not for them a relative and conventional thing whose limits each may fix according to his fancy. The "word" has its individual power, its absolute value; its authority is preternatural. The name of a person or of a town is not chosen at random; often a sorcerer or soothsayer is consulted. A divinity or more simply, a beneficent spirit, is thought to have revealed, at the moment of its foundation, the name which alone could assure to the city its prosperity through the coming centuries. Everyday language, especially procedural language, shares in this religious origin. Individuals are not allowed to handle it according to their fancy.

In a primitive assembly of the people, what accused person would dare to dispute the meaning of a word? Such an act would seem equally stupid and sacrilegious. To define, to impose limits to the power of a juridical term, can belong to no human authority.

What certain privileged persons can do, under the inspiration of supernatural beings, is to connect a certain

act or a certain conception with a given word, but without claiming in any way to fix the extent of its meaning. This is a logical process the reverse of the definition, quite as much as induction is the reverse of deduction. So that the majority of old juridical terms have no logical meaning. For logically a word takes its meaning only through convention, that is to say, through definition, since the earliest civilizations never fashioned definitions; their vocabularies eluded any precise signification. Many historians have committed the grave mistake of trying to find in ancient terminologies an exactness which does not exist. To define the juridical expressions of primitive customs and even of relatively modern customs, is to misapprehend entirely the psychology of earlier ages. In saying this we mean, be it understood, to criticize only those — and there are numbers of them — who demand of the past what the past cannot give them, namely, a rigidly fixed vocabulary.

Certain old juridical words may correspond to various ideas, although it is impossible to base one upon the other or make them agree. But if they have no precise meaning, they have no precise effects. It is not easy to tell what they intend to say nor whence they derive their authority, but it is easy to determine in what they will result. All acts which lead towards the same effects, although they may be of very different nature, have a tendency to become centered upon a vocal sound.

Thus in the West Gothic law:¹ If any one kills a person in a church, it is a "nithingsvoerk," a crime which cannot be expiated by a penalty. . . . If any one kills a person at a "Thing," it is a "nithingsvoerk." . . . If any one takes revenge after peace has been promised, it is a "nithingsvoerk." . . . If any one cuts off both hands of a person, if any one kills a sleeping person, it is a "nithingsvoerk." . . . It is a

¹Lex Visigothorum. Ed. Beauchet, p. 168,

“nithingsvoerk” to carry a shield on this side of the forest. . . . If any one binds a person to a tree in the forest, it is a “nithingsvoerk,” . . . etc. . . .

Thus it is seen that there is ranged under a common expression a great number of acts of very diverse nature, so that the word itself can be precise only in the effects produced; that is to say, it escapes all definition.

The French Penal Code has often been reproached — and with good reason — for defining crimes, misdemeanors and offences by the penalties attached to them. This is clearly a fault of logic, a survival of very old habits of thought.

(2) *Origin of Juridical Definition.* The earliest juridical definitions did not arise from the anxiety to determine the precise boundaries of abstract conceptions in order to understand them better. The desire to establish a sufficiently exact agreement between the sign and the thing signified came to the jurist only with the influence of philosophers. The earliest juridical definitions were dictated by practical considerations which may be grouped in two classes:

(a) In the first place, the necessity of *translating* legal terms. All the ancient peoples, as well as those of modern times who have played an important part in civilization, have changed their juridical language in the course of their history. At first they changed it in a way made natural and necessary by the simple evolution of the tongue, which was so incessantly changed and modified that after a lapse of some centuries the terminology was often completely transformed. Often the juridical vocabulary remained stationary a long time, following school traditions. In this case, it became incomprehensible to the common people, and special works were necessary to bring it within the reach of those who wished to instruct themselves. Thus many peoples, among those who have had the most brilliant destinies and the richest ju-

ridical histories, have entirely changed their language one or more times, adopting for one reason or another the speech of a conquered, a conquering or simply a neighboring race. In which case, it was necessary to explain in the new language the words used in the old systems of jurisprudence. Sometimes an ancient tongue was preserved in whole or in part through its use by men of letters, among whom jurists are to be included. In such instances it was none the less necessary to establish relations between the language of the scholar and that of the common people. Numbers of examples might easily be taken from almost anywhere. The long-lived Assyrian-Babylonian and the Hindu civilizations, ancestors of Semitic and Indo-European legislations, might be placed in the first rank. The modern history of western Europe would show us the Latin and the German idioms continually acting and reacting upon one another in the juridical terminology of the Frankish period and of the Middle Ages. Finally, we might cite England as a particularly interesting example; in a relatively short space of time, this country changed its juridical tongue four times from top to bottom, and mingled expressions borrowed from four periods, — the Latin, the Saxon, the French and the English.

Every time that there is any special idiom in the law it must be explained; to explain it is to translate it; to translate it is to define it. In order to affirm that two expressions are equivalent, their meanings must be compared; accordingly, they must be disengaged. There will be a tacit definition when the translator confines himself to placing the popular word by the side of the technical word; there will be an expressed definition when, feeling the necessity of a more complete explanation, he endeavors, by means of paraphrases, to make the content of a foreign or an archaic word better understood. These definitions will be worth what they are worth,

they always bring juridical thought nearer to a more systematized method.

When the translation is addressed to a limited public, every difficult word may be explained as it occurs in the text: if it is directed to a wider public, it will become necessary to arrange special collections devoted solely to the explanation of juridical terms. Accordingly, numerous works under the name of "lexicon," "exposicio terminorum," "vocabulorium," "termes de la lay," or other similar titles, arrange the legal terminology in alphabetical order or according to the subject matter. Besides, dictionaries of the law are collections of definitions to only a very unequal extent. Some of them are rather collections of juridical principles; such a one is the great dictionary of Albericus of Rosciate. But a great many others in all countries are devoted almost exclusively to fixing the meanings of words and are therefore in the category which is of interest to us here.

(b) In a second group may be classed *controversial* definitions, — those which arose in the course of the lawsuits themselves. Since the words had here lost the mysterious prestige which forbids any discussion of their meaning, the pleaders threw themselves with enthusiasm into this new form of discussion, which was open to the worst causes and was always very embarrassing to the judge. Cicero, the great theorist of the definition, has done much to propagate it and to make its exigencies known to jurists. His definition of the "gens" is justly celebrated. But if he understands the exigencies of logic, he also understands his trade as a lawyer. Thus in the "Oratoriæ Partitiones" (§ 52) he tells us: "In this manner ordinary words are assigned to the accuser and doctrinal words to the defendant. Which of the two will win depends upon whether the one, by defining and describing the word, will better reach the understanding and imagination of the judge, or the other will approach

more nearly to the ordinary force of the word and that perception of it which the listeners hold incomplete in their minds."

Time and again he insists upon the fact that lawsuits become reduced to questions of definition. Here is an example which occurs several times in his works. A law intends to favor the sailor who remains at his post during a tempest, by giving him the share of those who quit the ship to save their lives. "Those who leave the ship in a storm, shall lose everything; the ship and its cargo shall belong to those who remain on the ship."¹ It happened that, of a number of sailors, some embarked in a rowboat but from there, by means of ropes, tried to tow the boat to port, while the others remained upon the ship itself, but only because they were too frightened or too ill to save themselves. They remained without budging an inch or contributing in any way to the salvage of the vessel. Would it be necessary by virtue of the aforesaid law to give everything to these last, to the detriment of the others? This is a question of definition, says Cicero. In order to arrive at a solution, it is expedient to define the expressions, "*navem relinquere*," "*in navi remanere*," and the word "*navis*" itself.²

Beaumanoir, who has small liking for definitions, feels their necessity, however, in certain cases, because of the fact that the parties in the lawsuit cavil over the meanings of words. Thus in the "*Coutumes de Clermont en Beauvaisis*" (No. 670) he says: "Many are the lawsuits, involving goods in dispute, where one of the parties wishes to carry off the things as personal, while the other party claims that they are heirlooms. And in order to clear up the uncertainty as to which is right, we shall in this chapter consider what things are personal and what are heirlooms."

¹ "*Qui in adversa tempestate navim relinquerint omnia amittunto: eorum navis et onera sunt qui in navi remanserint.*"

² *De Inventione* II, § 31, *Ad Herennium* I, § 23.

In imitation of the Digest of Justinian, the collection of the Decretals of Gregory IX has its next to the last heading devoted to the meaning of words "*De verborum significatione*." Under this title are to be found, not abstract doctrinal definitions, but answers which various popes have given to questions which have been addressed to them by bishops upon the meaning of a certain number of words. Here likewise it is the conflict of private interests which has given rise to the necessity of defining.

This investigation of the meaning of words, brought about by the caviling between the parties, may be more or less objective, or subjective, according to circumstances. For it is often a question of interpreting the intention of the parties and of establishing, not the general and absolute meaning of an expression, but what it represents under particular circumstances in the mouth or from the pen of a particular person. The jurist ought to understand the meaning of contracts between private individuals, the language of the notary and the business man, as well as that of the judge and the lawmaker. He asks himself what a particular person under particular conditions meant to say. For each term he makes a series of relative definitions, which perhaps will not agree in any way with the objective and absolute definition which he would have to formulate in a rational legislative system. Since, whether through ignorance or negligence, no one is strictly accurate in his language, juridical terminology is always more or less loose, and justice demands that it be broadly interpreted. "Frequently, while the proper signification of words is striven after, the true meaning is lost,"¹ Pope Gregory very rightly says. But from the point of view of pure logic this easy lack of constraint in expression creates vicious intellectual habits. The continual employment of these definitions "*ad utilitatem causæ accommodatæ*," to use Cicero's expression, may

¹"*Plerumque dum proprietas verborum adtenditur, sensus veritas amittitur.*"

cause the practitioner to lose the faculty of analyzing with scrupulous precision in cases where the retention of such power would be useful to him.

(3) *Early Defective Forms and Later Development of Juridical Definition.* It is not astonishing therefore that the old practitioners have even in their writings given particularly defective forms to their definitions. The definition "it is when . . ." is a universal psychological phenomenon; it is a necessary state of mind which proceeds from the concrete to the abstract. We know that there is never an examination in any country where pupils of limited cultivation fail to use it. No more do the old jurisconsults, especially when they have frequented court-rooms rather than school-rooms. The good Beaumanoir does not himself deny its use: "A novel disseisin is when"; "A fresh disorder is when" ¹

Among English jurisconsults, positive and practical minds as they are, definitions in "it is when" abound. Moreover, it is to be found in all countries. For childish enough as the formula seems, it is, nevertheless, not without value and corresponds to a state of logical strength which it would not be uninteresting to study at greater length.

The etymological definition is employed by more cultivated minds. It was particularly dear to the theologians of the Middle Ages. The canonists were also very partial to it and borrowed freely from the "*Liber Etymologiarum*" of Isidorus. That section of the Decretals which we have cited uses them also as well as others, and departs from the etymology to make the meaning precise. For example: "'Testes' (witnesses) were in ancient times called 'superstites' because they were brought upon the suit standing for hearing; now a part of the word having been discarded, they are called 'testes.'"² The Romanists

¹ Op. cit., No. 955 and No. 957.

² "Testes antiquitus superstites dicebantur, eo quod super causæ statu proferebantur, nunc parte ablata nominis, testes vocantur."

also created etymologies, but in a more incidental fashion, and Bartolus advises one to be distrustful of them: "Definition is more to be watched than etymology or allusion."¹ The etymological definition presupposes a certain amount of learning; but from the logical point of view, it is even more defective than the definition beginning "it is when . . ." because, in the first place, the etymologies of the Middle Ages were nearly always false, and especially because there is no necessary relation between the origin of a word and its meaning.

In the twelfth and thirteenth centuries, when practitioners of common or of feudal law nearly always neglected to explain legal terms or did it very awkwardly, and when the canonists were distrustful of too precise definitions, the jurisconsults of the schools followed an entirely different method. Regularly and for each institution, the definition was the basis which took precedence of all others. From it all the developments of the chapter had to follow as deductions from a principle. Each element of the formula was taken apart and studied more or less minutely. Every question, even one of detail, had to be connected directly or indirectly with the one following. This method was used successfully for centuries and the works which it shaped are innumerable.

The jurists had borrowed it from scholastic philosophy. The rules of definition had been found in the Roman texts themselves. The Roman jurisconsults had learned much in this respect from Cicero and Quintilian. Upon one side as well as upon the other, the law owes to philosophy this first element of its logic.

When the definition had conquered the domain of the law, when it had forced itself upon the lawmaker as well as upon the lawyer, it disported itself as an absolute but debonair monarch, who may have the last word when he

¹ "Diffinitio magis attenditur quam etymologia seu allusio."

wishes but whose authority is at the same time lax and capricious. It has the air of governing everything; in reality, it allows itself to be governed by circumstances. It is supposed to be obeyed, but provided that proper forms are observed, many liberties can easily be taken with it. Moreover, it has rendered great services in this way. If its rule had been too severe, it would have been more unbearable without being more justified.

III: *The Logical Value of the Juridical Definition.* Before all else, it behooves us to state very clearly that we are studying here juridical method as it presents itself to us in the past and in the present. We are observing the nature of the intellectual forces which have been at work and are still at work under our very eyes in the building up of the law.

What might juridical technic be, what ought it to be? Can we hope for its transformation? If so, what would be the scope of this transformation? These are present-day questions of the greatest interest, but they are foreign to our work, which bears upon the philosophical principles of the history of law and not upon the philosophy of law.

Likewise, it is to the philosophy of law that another problem must be referred: What technic is best adapted to attaining the most objective and the most scientific conceptions of law? We shall have to devote a chapter to these theories of "Pure Law," not to discuss them as such, but in order to know whether they have been able to introduce new logical forces into the evolution of the law, or whether it is probable that they will be able to do so. For the time being, we are avoiding them completely. It is well to insist upon this fact here, because the methods called scientific ought to have scientific definitions — empirical or genetic — that are unassailable if they wish to justify their pretensions. Not having to judge them, we put them out of consideration.

In the formation of our modern legal systems as well as in the technic of our positive present-day laws, the definition is an operation of considerable efficacy, and of great rational value, but without any strictly logical value. Definitions do not answer to the simplest exigencies of scientific thought, and still less, be it understood, to the most complex exigencies. There are a thousand reasons why the term "logical" should be denied them. We shall cite but a few, however.

Juridical speech is formed generally of words in current usage to which a technical meaning has been given. "Dowry," "franchise," "partnership," "community," "adoption," "condition," "acknowledgment," "real estate," "execution," etc., have a broad and popular as well as a narrow and technical meaning. The lawyer and lawmaker who need every-day language quite as much as technical language, very often use the same words in a very different sense. The lawmaker has his moments of weakness and forgets his own definitions. He does this all the more easily since legislation is only a fictitious unity to which the labor of an infinite number of individuals has contributed.

Contradictions in terminologies in one and the same work or in one and the same piece of legislation are not an irretrievably serious matter. Besides, they may be avoided if one is sufficiently attentive. The particular affectation of the conscientious jurisconsult is to give to his vocabulary an appearance of precision which denotes the true elegance of the thought. This ideal of a writer who would always give the same well-defined meaning to each of his words is seldom realized. It is, however, in every instance within the range of realization.

A much more serious matter is that juridical definitions are always ambiguous and from several points of view at the same time. Are they definitions of words or of things? We have seen that they are a little of both. It is never

known exactly whether the framer of the law or its interpreter intended to inscribe an idea as it existed outside of his conception or according to his conception.

Are definitions indicative or descriptive? As far as doctrine is concerned, every author clearly has the right to use both, provided he conforms to the rules of logic and makes it distinctly understood what point of view he assumes. The framer of the text of a piece of legislation ought not to enjoy the same liberty; since his prescriptions are always of an imperative nature, he is bound to give those whom he commands clear and complete explanations. These definitions ought always to be logically descriptive and essential; they ought always to contain the essence of each institution. In reality, this is far from being the case, and the attentive reading of any code whatsoever would prove it abundantly. Nevertheless, let us not insist upon this fault which is but accidental and might be rigorously corrected.

But here is something much more serious: If the essence of an institution is incorporated in a formula, by that very act its sphere of practical application is delimited; that is to say, by that act there is decided by implication an infinite number of concrete cases of which the writer had not the least idea at the time he framed the formula. The future may make the legislator pay dear for his imprudence. He may see himself caught in this dilemma; theoretical incoherence, or disastrous practical result.

Article 2071 of the French Civil Code defines the pledge as "a contract by which a debtor surrenders a thing to his creditor as security for the debt." The essence then of this contract is that the debtor "surrenders the thing to the creditor." At the time, the definition was correct; no pledge without the surrender of the thing into the hands of the creditor. But at that period a stock of goods was not an instrument of credit. When it was

found out how useful it would be to make this an instrument of credit in order to permit the proprietor of a firm of good standing to procure money, the recourse to the pledge was inevitable. If there had been any intention of holding to the formula of the Code, when the merchant gave a pledge on his stock he would have had to put his money lender at the head of his business and give over the management of it to him until the payment of the debt, which would have been absurd. Judicial decision, and statute afterwards, sanctioned a pledge where nothing is surrendered, so that the formula of the Civil Code is thus devoid of meaning, and it hardly seems any longer possible to give any definition whatever of the pledge.

Judicial decision was right, be it understood. The practical policy was too great to permit of any hesitation. But had practical policy been of small account, courts would have hesitated to mar a text, and very legitimate interests might have been sacrificed. Now there is no reason for a simple question of technic to stand in the way of a solution. Technic is a very interesting element of juridical science, but it is not the law.

There have been violent and not ungrounded protests against the tyranny of juridical definitions. They have been accused of being an obstacle to the normal evolution of the law. Theoretically this charge may be quite well established. At any rate, a young lawyer who had consulted to advantage Goblot's profound work has given excellent arguments for banning descriptive formulas from the law; only indicative formulas, which have no precise content and are susceptible of modification at any moment, ought to be tolerated.

That is going a great deal too far. Purely indicative definitions serve no purpose in juridical discipline. It would be a great retrogression in thought. Let us keep what we have of the better and not lay a boycott on it,

There is no need to throw to the dogs all that is not fit for the altar of the gods. The earliest elements of juridical thought have not the strictness necessary for admission into pure logic. They have only a rational value.

But what is rational? A word as yet rather indefinite, to which we hope to give a meaning in the next chapter.

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CHAPTER XI

THE RATIONAL ELEMENT IN LAW (continued)

C, ANALOGY; D, PRINCIPLE; E, FICTION

C. Analogy

§ 1. REASONING BY ANALOGY: (I) ANALOGY IN THE DIFFERENT SCIENCES; (II) COMPARISON AND ANALOGY; (III) ANALOGY PECULIAR TO LAW; (IV) LOGICAL VALUE OF ANALOGY IN LAW.

D. ('Construction')

§ 2. JURISTIC CONSTRUCTION: (I) NATURE; (II) PRINCIPAL FORMS; (III) LOGICAL VALUE; (IV) HISTORIC RÔLE OF THE LEGAL 'CONSTRUCTION.'

E. Fiction

§ 3. THE JURISTIC FICTION: (I) DOGMATIC FUNCTION; (II) HISTORIC FUNCTION; (III) LOGICAL VALUE.—§ 4. THE PROCEDURAL FICTION: (I) IN ORDINARY PROOF; (II) IN PRESUMPTIONS.

§ 5. CONCLUSION: RÔLE AND VALUE OF THE RATIONAL ELEMENT IN LAW.

C. Analogy

§ 1. *Reasoning by Analogy.* In the history of concrete institutions, as in the history of languages, analogy influences the reflective powers of human beings without appealing to them. Just as a new word is very often fashioned in the image of an old one, so new institutions borrow the forms of old ones even when they present themselves as their antagonists. This development of concrete and practical juridical creations through the process of imitation will be studied later. Here we shall examine the action of conscious, rational analogy upon the science and the logic of the law: i.e., reasoning by analogy.

In legislation as well as in jurisprudence and doctrinal matters, the relations of resemblance which may exist between legal conceptions or situations have always been knowingly utilized for the purpose of obtaining the solution of new cases and of thus enlarging the domain of juridical influence. Reasoning by analogy is almost continually employed in our science. It is important, therefore, to understand its nature and its value.

Philosophical logicians do not agree perfectly upon this point. But their point of view is not quite identical with ours, since they ask what analogy is in itself, from the abstract and theoretical point of view, while we have to study it as it presents itself practically in every-day considerations and discussions, more particularly in juridical life. It is necessary, however, for these two studies to be mutually based upon one another.

I: *Analogy in the Different Sciences.* In mathematics, analogy is perfect reasoning. Thus, in geometry any figure may be of service in making calculations concerning another figure which resembles it; being given a triangle all of whose various elements are known and another triangle which resembles it but certain of whose elements are not known, one may calculate with certainty the unknown elements by the fact of the similarity of the two figures. We are told that in any triangle whatsoever, a small triangle similar to it may be constructed by drawing a line parallel to one of the sides. By virtue of this principle, if we know the dimensions of the large triangle and a single point concerning the small one, or the dimensions of the small triangle and a single point concerning the large one, it will be sufficient for complete and certain information in regard to both; whereas if the two figures were not similar, the knowledge of the one would be of no use in a computation of the other. Accordingly, in mathematics, analogy — the computation of a like by means of a like — is a process as fruitful as it is certain.

This is not the case in the logic of the concrete sciences. There analogy leads to probability, but never to certainty. Moreover, the reason of this is very simple; a mathematical resemblance is something other than a common resemblance. The elements of the two similar figures are entirely different, but they are all in the same proportion. There is nowhere absolute identity, but everywhere identity of relation.

In the concrete sciences and in ordinary logic, we call "likes," objects or phenomena which have common elements and elements which are different, that is to say, between which no relationship exists. There different elements may be very numerous or very few; but here where there is no correspondence or relation, no calculation is possible. A problem thus stated recalls the one wherein the age of the captain is calculated according to the dimensions of his ship; and a mathematician would refuse to trouble himself over it. But in practical life we are satisfied with solving insoluble problems with the data at our disposal. We solve them but roughly, and with little profit. Nevertheless, the solutions are not absolutely arbitrary, and circumstances quite foreign to the calculation itself may confirm them in a manner which will make them almost a certainty. Thus the natural sciences avail themselves of analogy in order to establish hypotheses which will be submitted to the control of experience. However unlike two contagious diseases may be, they have the common characteristic of being contagious. It is known that one of them is due to a microbe; from this it is concluded that the other also must be caused by a microbe. This is not certain; analogy has furnished only a probability, but this probability will direct the research. Certainty will be gained only at the moment the second microbe is disclosed.

Moral disciplines are deprived — or nearly so — of verification by experience. When they employ analogy, it is

without any especial hope of being able to attain certainty by any course whatsoever. They are only more ingenious in looking for the very strongest degree of possible probability. Although its results are always vague and indeterminate, juridical analogy none the less puts forth a great deal of intellectual effort in trying to make the best use of the feeble resources at its disposition.

II: *Analogy Based on Comparison and Analogy Based on Analysis.* An ordinary likeness does not in itself authorize any logical conclusion. From the fact that certain objects or phenomena have certain characteristics in common, it is impossible to conclude whether the unknown characteristics will be alike or different. Accordingly, no comparison between the objects or phenomena is justified.

Two persons have each killed a man by stabbing him with a knife; what will be the fate of the homicides? The similarity between the material acts does not allow one to say. The circumstances which are unknown to us may be so entirely different that one of the killers will die by the more extreme punishment, while the other will be absolved or justified without prosecution. An instance of the last would be the killing of a slave by his master in a primitive stage of civilization. In an advanced stage of civilization, the absence of intention, or a lawful excuse, can absolve the homicide. Therefore, the partial resemblance of the two acts can furnish us with no solution. In order that juridical analogy may be able to perform its function, something more than the establishment of an ordinary resemblance is necessary. According to natural tendencies and education, different minds will not pursue the same methods in seeking that "something more" which is necessary to establish reasoning by analogy. Primitive logic employs especially the analogy of comparison, and scholarly logic, the analogy of analysis.

(1) From the single fact that two phenomena are different in certain aspects and similar in others, no conclusion can

be drawn. But if the phenomena are identical, everything which is true of one will be true of the other; and if they are almost identical, the same similarity will be almost exact. The resemblance then becomes an approximate identity. Those who, by means of analogy, wish to apply to one juridical fact the characteristics of another juridical fact attempt to prove that the number of characteristics which the two have in common is very considerable and that the number of points in which they differ is insignificant, and that, accordingly, it is right to treat them as identical. Those who are opposed to comparison will insist upon the differences and try to conceal the points of resemblance. These processes of argumentation and counter-argumentation are very much used in practical, in political, and sometimes even in juridical life. They are characterized by these two phrases which are commonplace enough but of great effect upon the public mind: "It is the same thing," "It is not the same thing."

Very often, when we blame an act committed by another, some one objects that on another occasion we ourselves have done quite the same thing. "It is not the same thing," we cry out eagerly, and there ensues a struggle between the course of reasoning of our opponent based on analogy and our own which is the reverse. It is certain that the two acts could never be absolutely "the same thing," and from the fact that they are not identical, we conclude that they are not analogous. Accordingly, we praise one and blame the other, when, if we were more strictly logical, we should praise or blame both. This situation is such a common one in the course of our existence that the least disagreement affords numerous examples of it. Especially do we use and abuse in a most outrageous fashion the very imperfect anti-analogical argument; and it is a curious fact that this inferior logical process, so common in social life, has scarcely yet been

noticed. Besides it must be admitted that skilful jurists and even philosophers do not always abstain from using it.

As regards analogy based upon similarity, although it is often badly conducted, it may likewise be employed with wisdom and discretion; in which case its use is perfectly justified. From the fact that the points of resemblance between two objects are very numerous and the points of difference very few, it may be quite legitimate to conclude that any special quality which is established as belonging to one stands a good chance of being met with in the other. This course of reasoning may be related to induction, and such the majority of logicians consider it. Its mechanism would be nearly the same, although its results would always remain less clear and definite. Many logicians recognize only the analogy of similarity. It is to this alone that the following phrase from Jevons refers: "The certainty of the process depends entirely upon the degree of resemblance or identity between the cases."

(2) Nevertheless, it is certain that the analogy which is based on analysis is of much higher value as a logical process. Without doubt it is more difficult to handle, but it goes to the bottom of things and is its own justification. Being given two like objects, each must be separated into its elements. We then distinguish the elements common to both and those which are individual to each. Everything which depends upon the common elements is common to the two objects; everything which depends upon the individual elements should remain individual. This operation has the appearance of being very simple and many persons will aver that it goes without saying and that they never reason in any other way. Such statements are made by the most simple-minded persons, those who are most often deceived in this respect. As a matter of fact, it is an easier matter to explain this form of analogy than to practice it seriously. Likewise, it will not be

without value to give examples of it and to examine their foundation.

Analytical analogy is concerned very little with the quantity of the similar traits, it takes note of their quality, of their agreement with that element which is the criterion of acceptance or rejection. Take for instance two diseases the symptoms and manifestations of which are entirely different, and which have but a single trait in common, that of being equally contagious. We know that one of these is caused by a microbe; from this we will conclude that in all probability the second has its origin also in a microbe, because there is a relationship between microbes and contagion. One explains the other; and this single common characteristic renders the analogy much more probable than do much more numerous points of resemblance whose relationship with the fact to be compared can not be grasped, as in the case of two extremely similar diseases, one of which is contagious and the other not.

Take an example from law. Two murders have been committed; the first with intention, premeditation and with no excuse. The guilty party has been condemned to death and to pay damages to the relatives of the victim. The second homicide resulted from a single act of carelessness; the harm done, however, is identical. In reasoning from analytical analogy, how are we going to judge this second case? There are in the two cases identical and different elements. The injury done by the crime is the same. Now in our legal system the injury done by the crime entails reparation; therefore the second will be sued for damages equally with the first. But the blame is not the same, and as the penalty is apportioned to the degree of culpability, there will be little or no penalty.

In these cases, analogy conforms to Cournot's definition: "A mental process which rises above the observation of relationships, to the reason of these relationships." In

the language of the law we say: "Where there is the same reason of the law, there is the same disposition of the law." "*Ubi eadem est legis ratio, eadem est legis dispositio.*"

Since law is an essentially analytical discipline, it ought soon to understand and practice analytical analogy. One ought to be fair and recognize that no other science has devoted such great efforts to attain this end. Ever since there has been a juridical logic, every legal practitioner who has pointed out the points of difference and resemblance in laws has done his utmost to arrive at the reason of these points of difference and resemblance ("*ratio similitudinis et differentiae*"). In periods of great legal reconstruction — there are no great hopes without a little naïveté — it has seemed quite easy to try to prevent the use of argument from analogy except in its most imposing logical form. Thus Portalis proposed to inscribe in the introduction to the Civil Code: "One ought not to decide one case by another except when there is the same ground of decision."

There is no doubt but that if the thing had been possible it would have been realized centuries and centuries ago. Moreover, his expression, "the same ground of decision," is extremely vague and can be of no service. For whoever reasons by analogy, even the vaguest analogy, thinks that there is the "same ground of decision." And, however poor it is, his formula is not worse than any other, for the difficulty is in the substance and not in the form.

Laws have not simply a single "*raison d'être*." Their various "*raison d'être*" are not always known to us. It may even be said that they are very seldom known exactly and beyond discussion. The motives which have guided the lawmaker may be entirely unknown to us; and it may very often be necessary to seek for them in the far distant past. If it is a question of disentangling the actual part played by a juridical disposition and its rational utility, the opera-

tion will be still more difficult and the result still more uncertain. The task set before legal logic is to clarify discussions, and to discover processes of simplifications which are within the reach of all. This is how it has come about that while the great value of reasoning by analytical analogy has been fully recognized and its place preserved whenever it was possible to do so without too great difficulty, Law has had to invent its own forms of analogy, employed at every period along with the forms common to all disciplines that we have just explained.

III: *Analogies peculiar to Legal Reasoning.* Analogy based on similarity is a little too simple to be openly acknowledged in even a low grade of legal atmosphere, and analytical analogy is a little too learned to be practiced with certainty in a legal atmosphere of high grade.

The law needs a simple and rapid method of reasoning, which, although set high above all, is within the reach of all.

It needs very general principles which cannot be subjected to dispute with each separate case. These the philosophic logic of analogy does not offer. Law has, therefore, created them for itself. It has created a large number of such principles, the two most important ones of which we shall study.

1. *First Principle.* Every approved rule should be expanded through analogy; every vicious rule should be narrowly interpreted. "Favores sunt ampliandi, odiosa vero sunt restringenda."

2. *Second Principle.* Every rule which conforms to the body of common law should be extended by analogy; every rule which is opposed to common law should be narrowly interpreted.

The first of these two formulas is, it may be said, of the moral order, the second of the constructive order.

(1) *Difference in Logical Structure.* What then is an approved rule, and what a vicious rule?

Every command or institution which is useful and in conformity with morality or justice is certainly a favored rule, e.g., marriage and property. A law is vicious when it is useful, but contrary to morality and justice, e.g., slavery in ancient times. There are, however, between these fixed extremes, intermediate and doubtful cases: useful laws which are in conformity with morality but contrary to justice; useful laws in conformity with justice but contrary to morality; harmful laws admitted nevertheless out of respect for justice and morality. Due to their inability to make a sufficiently exhaustive analysis, theorists who distinguish between vicious and approved rules neglect to pronounce upon such cases. This in itself condemns their teaching as inaccurate, and inaccuracy should be fatal to it.

Reasoning by analogy upon common law does not permit the same faults of logical deduction. Since it is itself an artificial and abstract work, that would be inexcusable. The principle of common law is one which admits of an indefinite extension of power. Normally it plays the part of the major premise in a syllogism. Analogy drawn from dispositions of common law may be compared to induction followed by deduction. Thus we see that according to a certain legal system citizens may buy, sell, borrow and form partnerships according to their intention, choosing the obligations to which they wish to submit. From this we conclude that liberty in buying and selling is in conformity with common law. We thus lay down the general principle of freedom of contract, which we can apply in a given case to each new hypothesis. The principle of strict law has no life of its own, nor any personal independence. It can be expressed completely only in connection with the general principle which it restricts. Otherwise it is incomplete. So we have sometimes wished that it were compulsory for every derogation from a principle of common law to be accompanied by the prin-

ciple to which it is derogatory. The scope of the exception is beyond the comprehension of one who is ignorant of the rule.

What is a derogation from a very broad principle may become common law as related to a more restricted disposition. "Every agreement contrary to good morals is null and void." As related to the liberty of agreements, the principle is strict law; as related to each type of immoral act, it constitutes the rule and may be extended by analogy. Thus, nearly every juridical disposition may be considered as strict law in relation to a broader principle of which it is a species, and as common law in relation to narrower dispositions for which it constitutes the genus.

(2) *Historical Independence of the Two Forms of Analogy.* Thus analogy from common law and that from approved rule have a very different logical structure. One may perhaps suppose that if they differ as to form, they are similar as to substance. For, it might be said, the principles to which the Law accords the greatest liberty of extension are precisely those which are recognized as possessing the greatest social and moral value. If this may be true in some cases, it is certainly not always so. The field of application of a principle is primarily a question of technic, and the broadest field is not always the most valuable. Moreover, it might be argued inversely that the exception is more valuable in the eyes of the lawmaker than the rule, since he has set it apart and given it a privileged position. This objection was not lacking in embarrassment to the dialecticians of the Middle Ages when they were attempting to establish the respective relations of privilege, of approved rule, and of common law.

In fact, if one studies at close range the juridical knowledge of a period or of a series of periods, one cannot doubt that the two forms of analogy are independent. They are seen living side by side, sometimes in such harmony that it is difficult to determine their respective domains,

sometimes in hostility and rivalry, with one trying to drive out the other.

(3) *Analogy in Roman Law.* Roman law recognizes the "jus singulare," which undoubtedly should be opposed to the "jus generale," and the texts tell us that this "jus singulare, non est producendum ad consequentiam," ought not to be extended by analogy. This is what ought to be restricted, of course, provided there be not some other reason for extension, just as general or common law ought normally to be extended provided there be not some other reason for restriction.

These other reasons for extension and for restriction of laws must be traced back to two different orders of ideas. The Roman jurists note a certain number of juridical situations which should be treated with laxity, and others which must be severely dealt with. Everything which facilitates marriage, enfranchisement, and the right of succession should be interpreted in the most liberal spirit; it is quite the contrary as regards institutions which we tolerate but do not esteem: these will be interpreted strictly. The most typical of this latter category is disinheritance. The text which best contrasts this popularity and unpopularity of institutions of equal authority is this from the Digest: "Scævola responded that there was another cause of the institution which was received favorably (*benigne*): acts of disinheritance ought not to be given assistance." Thus the institution of inheritance should be examined *benigne*; disinheritance should find in the magistrate and the judge severe critics ready to annul it if it is not absolutely irreproachable as to form and substance.

There is therefore a certain inequality between the various elements of positive Roman law, an inequality which is admitted by jurists themselves. A certain text is sympathetic, a certain other antipathetic, and they are not interpreted in the same way. But Roman jurists did not

say that they had favored rules, and still less, vicious ones. In Latin, as in French, the expression is rather strong. A law may be vicious for those who condemn it and wish to see it wiped out. But to apply the term "vicious" to juridical dispositions of recognized legitimacy and utility is certainly an exaggeration, even though these dispositions might present some inconveniences.

As far as I know, the word "vicious" was never used by Roman jurists to valuate laws. But between Roman law and the Romanists of the Middle Ages there arose a misunderstanding which seemed trifling enough but which exercised, nevertheless, a rather important influence upon the history of juridical logic; it was this:

Along with the distinction between sympathetic and antipathetic laws, Roman law had another category: rules made "in odio" and those made "in favore." Those made "in odio" are those made through hatred and with repugnance towards certain persons. Laws intended to control any specified class which is in disrepute among the populace generally, such as usurers, actors, camp-followers of the army, swindlers, etc., are made in hatred of these personages — "in odio usurarium," etc. It is not that the law itself is odious; far from it; its disapprobation was merited. But in the path of hatred and repression, Roman science wished to make it impossible to go beyond the line laid down by the lawmaker. Hence, for such rules, interpretation is in principle restrictive.

Reasoning by analogy in the Roman law embraced therefore three divisions:

- { Common Law: extensive;
- { "Jus Singulare": restrictive.
- { Sympathetic Institutions: extensive;
- { Antipathetic Institutions: restrictive.
- { Laws made to favor esteemed persons: extensive;
- { Laws made against persons held in disrepute: restrictive.

The classic example of the contrast indicated in the last division is furnished by the Velleian and the Macedonian Senate decrees. The first was established "favore mulierum" and the second, "ob poenam creditorum."¹

The Romanists of the Middle Ages made the mistake, rather a surprising one for analysts of their strength, of ignoring this threefold division and of reducing it to a twofold one by merging the two last categories into a single one. Through this mistake they were led to valueate certain rules as "favored" or "vicious," — a conception which was entirely contrary to that of the Roman jurists.

It is evident that the triple division of the processes of argumentation based on analogy is the only exact one; and if this were a treatise upon juridical logic, that would be the division necessarily adopted; but in a historical survey as rapid as this, the third category may be neglected, once its existence has been pointed out.

(4) *Varying Prestige of the Two Forms.* Therefore in all our ancient law — in France up to the Civil Code — analogy through common and special law and analogy through favored and vicious rules are equally employed. Nevertheless it might perhaps be affirmed that the first method predominated down to the twelfth and thirteenth centuries and that in the following centuries there was an exaggerated tendency to reason in terms of "favorabilia et odiosa."

Grotius employed the last method of interpretation, but Heineccius and Thomasius warred against it, the latter condemning it most unmercifully. Its prestige died out in the course of the eighteenth century. Portalis did nothing more than express the general opinion when he ordered the following to be inscribed under the preliminary heading of the Civil Code:

"The distinction between favored and vicious rules

¹[The Velleian Decree allowed a married woman to bind her property by contracts, except as surety. The Macedonian Decree allowed the son to bind himself by contract of surety but not by debt for a money loan. — ED.]

made with a view to extending or restricting their disposition is open to misuse." Commentators on the Civil Code allow a large place for analogy through common law. It is one of the most important and incontestable principles of their argumentation. Analogy through favored rule is not openly avowed, although perhaps it is clandestinely practiced. In theory, it is not taken into account in classical juridical logic. For example, the bequeathal of property to be left at one's death, authorized through marriage-contract to be in favor of future wives or husbands and their children, is a favored measure but a bold derogation of common law. Its first character is not taken into account; it is interpreted as strictly as possible by excluding combinations which have exactly the same right in the law as those expressly admitted by the text.

The new schools which make such lively attacks upon the constructive logic of the classical school ought not to spare the kind of analogy which is there practiced. One might expose a tendency among certain recent authors to resuscitate analogy of favored rule under a new and perhaps improved form.

IV: *The Nature of Reasoning by Analogy and its Logical Value in Juridical Science.* If, therefore, it is perfectly reasonable to apply similar juridical dispositions to similar cases, it is seen to be a difficult matter in practice, since, in order to discover the resemblance and put it clearly before the eyes of all, a series of processes must be resorted to which are of very unequal value and but slightly in accord with one another.

Our aim is to disclose the intellectual forces which have been at work in the development of the law and to estimate their value. The conclusions at which we have arrived appear practically incontestable.

(a) Analogy has played an important part in the framing and interpretation of laws. The ordinary and learned

forms of this method of reasoning as they appear in the concrete sciences being insufficient for the demands of juridical science, it was found necessary to invent special forms which were more easily handled but more artificial. Analogy has, moreover, cumulated juridical forms upon those of general logic.

(b) Since analogy furnishes only approximate results in the concrete sciences, it is very certain that it can make no pretence of greater accuracy in the Law. In revealing resemblances it proceeds in different directions according as it adopts the form based on similarity or that on analysis, that of common law or that of favored rule. It is, therefore, an incontestable fact that its procedure is artificial if not absolutely arbitrary.

(c) Analogy is in itself a purely rational mental operation. It functions normally without making any appeal to collective or individual morality or sentiment. Even the category of "*favore et odio*" is a creation of the intellect rather than of sentiment. Let it be understood, however, that this is not saying that sentiment or emotion cannot employ this form of logic or any other and direct it along a special line. But normally and in itself analogy is an act of the intelligence. It is an incontestable fact that its character is rational but of no absolutely logical value.

D. Construction

§ 2. *Juridical Construction*.¹ The study of juridical construction — its definition and field of influence, the

¹[For the word "construction" there is no exact equivalent in modern Anglo-American legal terminology. It is an established technical term of common usage in French and German writings; and at one time (when English lawyers were more in touch with Continental legal thought) it was in use in English law-books; e.g., "*Law Constructions*," the title of a chapter in Noy's "*Maxims*," ed. 1642.

It is nearest translated by "generality," and signifies an abstract principle formed by generalizing from several concrete rules, and serving to harmonize them and to supply a common basis for them. "Construction" emphasizes the process, "generality," the result.

In Continental usage it is of course most common as a generality serving to support several specific texts in different parts of a code. But it applies equally

part which it behooves us logically to attribute to it in the formation of the Law, its actual activity as much from the present-day as from the historical point of view, — this study, I say, has been greatly neglected by legal philosophy and pure juridical science. It seems that instead of trying to seize the bull by the horns, there has rather been a game of dodging it. How many volumes have been devoted to erecting juridical constructions! How many jurists have passed their lives at it without even a vague explanation of the “*raison d’être*” of their toil! Have they known exactly what they were writing about and why?

It is the fate of many abstract problems never to find any final solution. Still it is proper to propound them and to accord them the attention they deserve. It cannot be disputed that the problem of the “*raisons d’être*” of juridical constructions must dominate the study of the constructions themselves. No more can it be disputed that this problem has very rarely been approached with frankness and that many have rather spoken of it incidentally, as of a thing understood instead of the principal question important in itself and difficult to solve.

The reasons for this tremendous lack in juridical logic are numerous. They are of such a nature as to absolve, in a large measure, the jurists from the reproach of intellectual sloth with which one might be inclined to charge them in this matter.

Moreover, it is fitting that there should be no exaggeration. If the very large majority of those who establish or employ juridical constructions are ignorant of their nature and scope, a great many others have fashioned for

when used to harmonize rules laid down by judicial decision. The Anglo-American restriction of usage for “construction” to the harmonizing of clauses in a single document is merely a narrow use of this broad term.

The word “construction” has here been preserved literally, because we need the word to fill a vacant place in our legal language, and because it was thought undesirable to risk a misunderstanding of the author’s thought by using any other word. — ED.]

themselves some theory in the matter, which although it may not be expressed as a whole, nevertheless is by implication the dominating force in their juridical thought. Finally, certain choice minds — and doubtless I am far from being acquainted with them all — have approached the question frankly and proposed more or less exact solutions.

I: *The Nature of Juridical 'Construction.'* In a very broad sense, every theoretical work is termed "juridical construction." But this must not be misunderstood. The task of theorizing is not wholly identical with the work of the legal author. The author does not confine himself to forming theory, nor is he the only one who forms it. Besides, theory has here a very special meaning, and is virtually that of systematization or logical organization of the Law.

Whoever wishes to trace the Law back to its logical elements must adopt the fourfold division of the functions of juridical science, — political, legislative, judiciary and theoretical. The political function evaluates laws already made or those about to be made; the legislative fixes what constitutes the law; the judiciary applies the law to particular cases; finally, the theoretical coördinates the provisions of the statute and when need be those of judicial decision. But what is very distinct in logic is easily confused in practice, and in fact it seems absolutely impossible to assign to each function an organ which is devoted to it exclusively.

In this matter, the authority of the judge is widely extensive. In deciding disputes between individuals and without going beyond his jurisdiction, he may exercise all the juridical functions. In fact, at least to a certain degree, he does exercise them. But the jurist, lacking legal authority, evidently works in a more Platonic manner, yet in a no less extended domain. He is likewise politician, lawmaker and judge, after a hypothetical, contin-

gent, and even an imaginary fashion. But whether it is a question of reality or imagination, the nature of the work is in nowise affected.

In the majority of legal treatises there is a political leaning: attempts to estimate the value of laws; critical explanations of their advantages and disadvantages; moral, economical and sentimental considerations which justify or condemn them; the pointing out of proposed reforms and an estimation of their value. This is what has been called "social data," and every jurist is interested therein to a certain extent. This political adjunct is easily distinguished from the doctrinal work itself.

No more are the explanation and interpretation of the will of the lawmaker a part of the doctrine, but should be classed in the legislative function. When he exerts every effort to make known all the commands which the lawmaker has given by expressing himself in a clear — and sometimes in an obscure — fashion, the legal commentator is simply the servant. He is like an intelligent domestic who understands with half a word the orders of his master. These orders would remain a dead letter if they were not understood. The framers of laws are likewise fortunate in having intelligent servants who do not compel them to be accurate in every little detail of what they wish to say. This is the rôle which interpreters play. Should they have no initiative themselves, they are still collaborators in the law through the single fact that they explain it and place it within the reach of all. The interpretation of the law belongs to the legislative and not to the doctrinal function.

It is very certain that the "technic of interpretation" is the work of theorists, and a very important part of their work. A great many writers on legal subjects have found it possible to believe that they did nothing more than interpret the laws according to certain rules.

As the lawmaker often furnishes only very general and

abstract right from which many real cases spring and concrete decisions must be given, one may easily be mistaken as to the nature of abstract ideas. But this is the way often in the sciences which are logically opposed to each other, the art of seeing points of view and that of classifying them. To this last alone, we give the name "theory" — in the broad understanding that we are departing from current understandings.

In the sciences, the point becomes particularly important and necessary. Students, or beginners, were indeed brought and trained in a profession as to what theories they would consider if he were judge. The position, the judgments, theories is considered, but he does not yet possess the bulk of things.

Theory is the form of Law. A person may examine legislation and judicial decisions without giving his thought any special form. He answers by a simple yes, putting the word using the word, "theory" is given full force and he is even the master of the subject in current usage, he places the light of truth upon the forehead of the one who had been deluged in the night. Theory's real mission is the construction of laws *general and precise* because by considering these *hypothetically* as a *consequence* of laws as the *beginning*. That is to say, theory's work is not the *revelation* of the law. For many all legislation and a great number of cases give their decisions a certain form as the manner that they are presented. They are then theories as to what comes by themselves, groups them into better theories and construct a *general law* in reason in which these former theories appear as *consequences*. Then they engage in *practical construction*.

The art of legislation absolutely free of all theory would be possible only in an extremely primitive condition. For were any person to undertake law in the

orders which are not to be executed immediately, and also many complex orders, he is obliged to adopt a method, a very rudimentary one perhaps, but nevertheless a method of classification, which is of the same nature logically as the most learned juridical 'construction.' In the simplest law, the theoretic feature is always noticeable, in ordinary codification it is considerable, while in scholarly codes the legislative act may end by being no more than a stamp set upon the labor of a pure theorist.

The judge who hands down his decisions in certain forms is also engaged in juridical 'construction.'

II: *Principal Forms of Juridical 'Construction.'* Since this is not a treatise on juridical logic, we are not going to make a complete classification of juridical 'constructions,' something which even legal logicians do not do. It will be sufficient to give several specimens.

(1) The simplest pronouncement of a command or a prohibition involves the choice of certain peculiar expressions necessary to its comprehension and execution. If, however, the framer of laws has no other end in view than the expression of an exact and isolated command, it can scarcely be said that he creates a piece of doctrinal work. Here, as in every question of degree, the distinction is a very delicate one.

But there is evidently doctrinal labor whenever concrete dispositions are presented in a certain order, or at least when this order is not due entirely to chance, which is seldom the case even in very primitive works. The Salic law is not strong in theory and systematization. It follows, nevertheless, a plan and a method, certain features of which are easily distinguishable, although the product dealt with belongs to an intellectuality very different from our own. In two texts whose contents are nearly identical but differently arranged, the order alone can reveal to us very different general conceptions of

Law and of society. The comparative study of plans of various juridical works is equally interesting and fruitful. It is quite certain that whatever is placed in the first line, whether it be the principles relative to the power of sovereigns, the dispositions of procedure, the principles of criminal law, the definition of justice or the division of laws — the fact of its being placed thus reveals independently of its content mentalities of very different types.

(2) More complex and more scholarly than the task of explaining texts is that of examining, scrutinizing and comparing them. No juridical science can dispense with such labor.

Each authoritative command is self-sufficient when its meaning is clearly determined. Suppose — what is chimerical — a code simple, clear, within general reach, and foreseeing without ambiguity all the possible and imaginary solutions of details. It seems that in such a case the theorist would have nothing to do and might only confuse the questions at issue. And so, when the legislator labors under the delusion that he has created a perfect piece of work, he is anxious to prohibit all commentary, which seem to him useless and accordingly dangerous. But it is impossible to prohibit men from making use of their brain power even in the presence of the most revered texts. Explanatory comments, contrasting of common characteristics, comparison and generalization, may be followed by cultivated minds through sheer intellectual necessity and without any intention whatever of criticizing or even of interpreting. We are then in the presence of a pure constructive operation. In doing this, the jurist adds nothing to the law, but he enriches juridical thought infinitely by constantly opening up new points of view.

Thus a code decrees in a certain number of cases that a person's property should not be restored to him; the

jurist groups these different cases and makes a theory of the law of possession. Thus the law attaches certain consequences to imprudent, negligent or deceitful acts in juridical life; the jurist disengages from these the idea of fault, and of fraud. Thus the legislator ordains that certain formalities must be observed in juridical acts under penalty of certain results; the jurist compares, and from them composes a general system of void and voidable acts. He may do all this without meaning to criticize or even to clarify in any way the concrete commands contained in the texts; they remain in law just what they were. Yet the mere fact of having manipulated and moulded the juridical material predisposes the jurist and all who come under his influence to look differently upon the present and the future provisions of the law.

The jurist, be it understood, nearly always employs his doctrinal abstractions with the aim of interpretation; but though the two functions are performed by the same man, that does not prevent them from being separate and distinct.

This labor of systematization consists especially in the grouping of abstractions. It may be centered about a concrete nucleus without affecting its character. Thus a manual may be compiled for the use of the justice of the peace, the commissioner of police, the constable, the rural police, the merchant, the farmer, and so on, by grouping together all legal questions which one or the other of these personages ought to understand in order to know what to do in the varied happenings of his professional life. Without having any especial influence upon the juridical mind, such treatises when well done demand a certain effort of analysis and are not lacking in interest.

(3) Finally, in a third group we place studies dealing with the nature of institutions. Every social act under

the surveillance of the law is submitted to a series of commands and prohibitions which accompany it through all its phases. Thus the institution of marriage may be subject to legal requirements from the first meeting of those who later become engaged — and even before this — down to the death of the married persons and even after. So in the sale, the law may direct the buyer from the time he makes the first tentative offers to procure an object for a sum of money, and the seller from the time he makes his first tentative efforts to obtain money in exchange for the object. It may follow them through all the stages — negotiation, the bargaining, the agreement, the delivery of the goods and the payment — down to the time when the two parties are completely and definitively satisfied. Generally the requirements of the law follow the life of the concrete act through all its phases, and if these prescriptions are numerous enough, they shape the general contours of these phases. So true is this that the legal prescriptions outlining the institutions finally come to represent the institutions themselves. Thus certain jugglers outline the form of a person by hurling knives around him as he stands against a board.

When the lawmaker has hurled his requirements so as to make the contour of a social act, he has created a juridical institution. This is an exceedingly practical and advantageous result. But one must not be deceived; the juridical institution thus created is basically independent of the Law itself, which might be presented in any other way without any internal modification. The juridical institution is only a theoretical 'construction.'

Among these juridical institutions some are older, simpler and in more general usage, while others are newer, more complex and less used. It is a good method to explain the least known by the best known, and the least familiar by the most familiar. Thus one may analyze exchange into two successive sales; may see in crop-leases

a tenancy where the proprietor receives as his rent a portion of the produce, or consider it a partnership of a particular kind; marriage contracts may be traced back to certain types of commercial contracts; elements of gambling may be derived from insurance; and so on.

However fruitful all these comparisons may be for the juridical intellect, they are only theoretical, that is to say, purely artificial 'constructions.' Only legal commands, expressed or understood, written or based on custom, constitute the institution from a positive and juridical standpoint. It is to them alone that one must turn to decide the conflicts which spring from its functioning. The form or the disposition of these commands matters little. In spite of the tremendous importance these 'constructions' have had in the development of juridical science, they remain purely theoretical, that is to say, basically independent. At least such a conclusion seems to me to be the result of the analysis that has just been made and of the observations we shall now present briefly.

III: *Juridical and Logical Value of Doctrinal 'Construction.'* To a question of positive law, one ought to be able to answer "Yes" or "No"; and if it is "Yes," it is not "No": if it is "No," it is not "Yes." Of course the "Yes" and the "No" may have their partisans and each of these partisans bring forward arguments which leave us perplexed; but even if we may be very much embarrassed to find the true solution, we know that there ought to be but a single good one. Is it the same with theoretical assertions? Are they necessarily true or false, good or bad?

An immense number of juridical works of all kinds and of all periods presuppose the affirmative, i.e., that every doctrinal description is accurate or inaccurate, that there is but one way of presenting these institutions or of working out their construction, and that for each institution there exists a perfectly harmonious logical form which is generally unknown and waiting to be discovered. Nearly

all juridical dogmatics in good repute in certain countries rest upon this assumption.

This does not mean that it behooves us to scorn dogmatics and pure juridical 'construction.' It is one of the highest forms of thought, a kind of intellectual gymnastics of superior quality, which develops at the same time, power of observation, perspicacity, subtlety and ingenuity. A mind familiar with this discipline will see at a glance a thousand points of view in a law text or the draft of a law which would pass unperceived by one to whom it is a stranger. It is therefore from the subjective point of view the highest form of pedagogy — be not afraid of the word — to which an already trained jurist can submit himself. From the objective point of view, it must be asserted that we do not truly understand an institution until we have made a comparative dogmatic study of it by bringing forward all the systems which have ever been evolved in the effort to explain its nature. Thus an endowment, a juridical act which permits an individual to pursue after his death and for an unlimited time a work of charity or public utility dear to his heart, is a very subtle juridical 'construction.' Certain theorists are particularly struck by the powerful effect which the will of the founder produces by creating an organism which will be able to function a long time after his death just as he willed it; others see above all else the property limited to a special end; others, the end to which the property is devoted; others still, the administrative organization; finally others, the beneficiaries; and so on. As many bases, just so many 'constructions.' When one will have set forth all these doctrinal systems, what justifies them from certain points of view and condemns them from others, and has thus turned the question over and over in every direction, one will then have the most perfect theoretical knowledge of it that it is possible to obtain.

This explains the great attraction, the wonderful fascination of studies in abstract juridical construction. Of such books as these it may be said:

“Open it upon your pillow,
You will see the sunrise.”

But the great attraction in these works lies in the variety of the opinions and of the argumentation. There is not an original or even a fantastic idea which ought to be excluded from them, for the truly ideal ‘construction’ of an institution is the synthesis of everything that can be said about it.

I know very well that many of those who have devoted their lives to the dogmatic ‘construction’ of institutions will be but little flattered by this opinion, for they claim to discover the absolutely correct solutions and to reject all others as absolutely false. To affirm that they are all of more or less value, and that in no instance is one of them of so much value that the others should be renounced in its favor, is not this depreciating even the nature of their toil? It is evidently refusing to satisfy fully the ambitions of each, but it is perhaps rendering truer justice to the common effort. However, these considerations are of no importance. Our sole desire is to penetrate juridical thought and to understand it objectively. With this object in view, what is the value of ‘construction’?

The question may be examined from a threefold point of view.

(1) Is there necessarily a perfect juridical form for each institution and is there but one such form?

(2) From a rationally established juridical ‘construction’ may one deduce the solution of an unforeseen practical difficulty?

(3) May the lawmaker and the judge oblige the jurist to accept a ‘construction’ upon jurist’s theory?

(1) *First Point of View.* If we consider juridical matter as the sum total of concrete decisions each of which has its "raison d'être" and its justification in a totality of varied circumstances, it is impossible to affirm that we shall always find a general and theoretical principle which will explain all the elements of any institution whatever. Where there is originally no logical community, there may be the possibility of a contingent, but not of a necessary or logical relation. Suppose that an individual who has allowed himself to be guided through his whole life by pleasure and selfishness should be asked after his death if he always adhered to the rules of strict morality. This would not be impossible if as a result of circumstances he had never taken pleasure in evil doing and it had never been to his interest. This would be a result of chance. If, in the same way, the wills of the different lawmakers do not spring from constructive logic, why should they necessarily conform to any constructive logic whatever? For that to be the case, it would be necessary to invent a preëstablished harmony between the demands of social life and those of theoretical logic. And this preëstablished harmony, which no doubt a great number of jurists are obliged to take for granted, whence does it spring?

It is, of course, always possible with a little ingenuity — and jurists are not lacking in that — to adapt the facts of any theory whatsoever to a framework which is entirely foreign to them. This operation is not in itself to be condemned if one bears in mind its entirely artificial character. Thus according to circumstances, the same individual will be portrayed as a saint or a monster. The critical mind will evaluate juridical 'construction' with the same scepticism that it does a newspaper article.

Likewise juridical dogmatists have no right to deal harshly with each other. No juridical 'construction' can be false or ridiculous because none can be absolutely true

or incontestably worthy of respect. The jurist Toullier has been severely reproached for his "mistakes." Among other things, he says that community between husband and wife, as it is established by the French Civil Code, commences the moment the marriage is dissolved. Is it more correct to say it commences with the marriage? Both of these assertions agree perfectly with certain concrete decisions but are antagonistic to others. A partnership which is formed by the fact of the disappearance of one of the partners is a fantastic conception, no doubt, but equally fantastic is the idea of a partnership in which one of the partners has only rights "in posse." Which shall we choose: one or the other, neither the one nor the other, or both at the same time? It matters little; the important thing from the logical point of view is not to attribute an exaggerated value to any one of the systems.

(2) *Second Point of View.* Can a juridical 'construction' furnish the solution of an unforeseen practical question? Upon this point, the attitude of legal theorists is generally ambiguous and lacking in frankness.

If 'construction' is foreign to the practical life of the law, and if practical law thrives quite as well in the absence of logic and in a state of "happy anarchy," one cannot see any justification for an argument of 'construction' modifying the law in the slightest degree, or extending or restricting its compass.

Now, very often one begins by announcing that "artificial construction," logic, ought not in any degree to be a hindrance to the free development of the social and commercial life. It ought simply to register this development and direct its manifestations. Some claim to establish the theory of an institution by a wise combination and treatment of the concrete data of the law. A construction thus established from certain known and concrete data ought accordingly to be of value only for these known and

concrete data. A new case arises; whatever may be its importance, politics or the social data are alone qualified to decide its fate. And if the new solution contradicts the learned theory which has been accustomed to harmonize with all the other solutions, so much the worse for the learned theory. It is knocked flat, and everything is to be remade.

If one wishes to be logical, one must decide that in no case can the most infinitesimal practical interest be sacrificed to even the most learned, complex and satisfactory 'construction.' For the constructive doctrine cannot in any measure do what is contrary to its nature. If it can decide one question of law, it can decide all.

Now, the majority of those who construct theories hold to this reasoning: "The system must be made to conform to life. I am going to construct a system by bringing together carefully all the known concrete data. But nevertheless I cannot work for nothing. Once my work is finished, the life of tomorrow must adapt itself to my system."

We see men as eminent as Jhering fall into this inconsistency. One might heap up examples by the hundreds to prove that the theorists who have studied the subject most deeply are not very definitely decided upon the logical value of juridical 'constructions.'

(3) *Third Point of View.* Can the lawmaker impose doctrinal construction? We admit that the lawmaker has the power to ordain whatever he wishes: we put no limitation upon his will. It is a question, be it understood, of the lawmaker in the abstract and of logical limitations. It is quite certain that in reality the lawmaker in flesh and blood is always kept within certain political limitations. But by its very nature the legislative function is omnipotent. On the other hand, in order to express his will, the lawmaker may employ the language which he finds convenient. He might express himself by gestures,

if it pleased him to do so; if he prefers to employ the learned language of jurists, he may do that quite as well. Practically, he can have the advantages of clearness, elegance and prestige when the law is drawn up in a certain fashion and in no other. Theoretically, all methods of expression are equally legitimate.

In fact, since even in quite primitive ages laws are drawn up by more or less skilful jurists, they nearly always borrow the language of theory, and in proportion as the law develops, the tendency to use abstract language becomes accentuated. Even the French Civil Code abounds in all sorts of constructions — definitions, classifications, abstract ideas and fictions — and, as is well known, this is not what can be called a learned code. Moreover, it would be extremely difficult for the framer of the law never to employ theoretical language.

But all theoretical ‘construction’ made by the legislator is only valuable through what it indicates. It serves to show us what the concrete solutions are which he has intended to sanction. If he obtains this result, the correction or incorrectness of his language matters little to us. The interpreter seeks only the means of penetrating into the substance of the law. As for theory, its right of criticism remains unmolested, whatever the lawmaker may say. He who could make a good definition out of a bad one, a threefold classification adequate when there are four elements to be classified, or a fiction a reality, could easier change a man into a woman. He cannot bring it to pass that conjugal community “commences upon the marriage day,” if in reality, by virtue of the provisions which he has himself decreed, it does not commence then.

IV: *Rôle of Theoretic ‘Construction’ in Relation to Historical Facts.* The confusion of ideas upon the question before us is explained by the fact that the logical and the actual historical points of view do not agree. In logic,

the substance and the form are two opposed and easily distinguishable ideas; in logic, the lawmaker, the creator of the substance, is very clearly separated from the lawyer, the creator of the form; in logic, the form is subordinated to the substance and the substance never departs from the form. In juridical reality, the form can create the substance, and accordingly all the functions of the law may become so entangled that it becomes impossible to unravel them. The politician who drafts bills, the legislator who decrees laws, the judge who applies them, and the lawyer who constructs juridical matter, are all abstract personages who exist in no civilization, not even in ours. In fact, it is nearly always very difficult to say through whom, through whose authority, a law has become law.

In theory, we say that the law is the work of a sovereign represented by certain organs; in fact, it is often very difficult for us to discover the action of the sovereign, the legislating organ, or even the legislative function.

The majority of juridical institutions in every period are produced outside of the law under the form of usages. When the lawmaker concerns himself with them, they are already entirely formed. The legislative function is summed up in a simple act of compliance; but even there it is still perceptible. In ancient civilizations, the sovereign is by no means the lawmaker; he intervenes in order to occasion respect for usages which he makes no pretence of knowing anything about. Shall we say that in those periods where the law is customary, it is the masses, the crowd of obscure, common people which performs the legislative function? In order to prove the falsity of this conception from a historical point of view, Lambert has traced its development at length and presented many proofs. Usages become juridical when they are sanctioned by tribunals; but tribunals do nothing but point out established usages. So that the legislative

function becomes confused with the judiciary function and absolutely indistinguishable from it.

In the same way, purely theoretical work very often, especially in primitive times, encroaches upon the legislative function. Whoever collects the customs of his country, brings them together and writes them down, even if he makes no pretence of imposing his will upon his fellow-citizens, nor intends to do so, directs the evolution of positive law. Solutions to which he has given preference stand a good chance of being chosen above others through the simple fact that he has preferred them. A written custom causes the disappearance of many unwritten ones. This is a commonplace fact in the history of juridical literature; a simple clerk of no authority or pretension has often had a decisive influence upon the progress of law. The most widely known and influential juridical works nearly always owe their reputation to qualities of form. Every collection of ordinances, decretals or judicial decisions results in bringing certain juridical rules into the foreground and in effacing or obscuring others.

It is not only a question of the past. In every period, the theoretical function partly creates the law even when it has no intention of doing so. The simple act of classifying, defining and constructing has an influence upon concrete solutions which have not yet been proved. This is a natural tendency of the human mind, an application — if you choose — of the law of least resistance. For solutions of small importance, the argument of 'construction,' will always take precedence over the political argument, since it is easier and more exact; and the accumulation of minor solutions of details may transform the general aspect of the whole of an institution.

To summarize, it may be affirmed that in the creation of the law, the form very often involves the substance. Whoever writes down the law makes the law, in however

minute or considerable degree. It may equally be affirmed that this creation of the law by theory is nonsense from the logical point of view, since treatment of the form must leave the substance intact. Hence, as theoretical labor is indispensable, as it has always existed and always will exist, we are obliged to conclude from this that juridical science is affected by an intellectual defect of which it can never be cured, and which will prevent its ever taking a place among the forms of science belonging to pure logic.

E. Fiction

§ 3. *The Legal Fiction.* Modern lawyers — a very great number of them at least — have an aversion to the fiction which I, never having understood their reasons, cannot share. And if I have never understood these reasons for hatred of the “fictitious,” it is because I have never seen them explained with even the slightest attempt to face the question. Perhaps there may exist a book where one can find them thus explained, but I do not know of it. At every turn I have seen “fiction” and “reality” set in opposition to each other without further explanation, and the arguer seemed to say to his public: “Not to prefer the reality to the fiction would be the proof of a very impractical mind.”

Jhering, undoubtedly, has already defended fiction against its detractors. Before undertaking to justify it anew, one cannot refrain from mentioning how pleasing and profound are the few pages in which he has accomplished this task. In spite of the powerful support which a brief and precise quotation from Savigny furnished him, in spite of the keen admonition to future theorists — “The Kobold of the fiction often takes cruel vengeance upon those who pursue it” — the passage from Jhering has had scarcely any influence, and the old lack of understanding has appeared again. Nevertheless, in his at-

tempt at rehabilitation, the profound jurist was a little short of the truth. The fiction was for him a useful but an inferior and, in some respects, a defective instrument, while in our eyes it is as legitimate as any other juridical 'construction,' no matter what. His ingenious distinction between the dogmatic function of the fiction and its historical function does not seem to me any less definitive, and I shall use it as the basis of my exposition of this intellectual process which is of such importance in juridical method.

The utterance of anything not true may constitute a "lie," a "myth," or a "fiction." The lie may be defined as "the affirmation of a fact contrary to the truth with the intention of deceiving"; the myth is the affirmation of a fact contrary to the truth — though not known to be such — by a sincere but rather weak intellect; the fiction is the enunciation of a fact which is false and is recognized and presented as false. Moreover, in order for it to be a lie, a myth or a fiction, the falsity of the assertion need not be evident or absolute. To announce an improbable event as very probable, a probable event as certain, or to embrace everybody in a proposition which in all likelihood pertains but to a few, is likewise, according to circumstances, a lie, a myth or a fiction.

Besides, the nature of the unreal alleged fact matters little. This may be a fantastic, supernatural fact, one contrary to nature (the dead gives seisin to the living), a natural physical fact which has not yet become a reality (the birth of a child who is only conceived), or a legal fact (the existence of a law which is no longer in existence, or the supposition of a formality which has not been observed). The juridical nature of all of these assertions is identical; when one enunciates them without being his own dupe or wishing to dupe others, a fiction is created.

Juridical fictions form two very distinct groups: fictions of 'construction' or theoretic fictions, which are of

use in the exposition and abstract study of concrete provisions of the law; and procedural fictions, employed by the judge in order to apply the law to the real facts of practical life. The latter govern particularly in questions of evidence.

The following paragraphs apply only to theoretic fiction. Procedural fiction will be studied separately.

I: *Dogmatic Function of the Fiction*. Thus juridical logic often asserts what is false. Now if it is asked why, in a serious work with a practical aim, anyone can indulge in statements which he knows to be false and declares to be such, it is easy to find a great many reasons for this, and all of them are sound.

Might the fiction be but a way the jurist has of amusing himself? To speak of amusement is to speak of attraction, interest, more intense mental activity, deeper attention sustained without effort or fatigue, and better retention in the memory. It would be something in itself to lighten the juridical burden.

It is undoubtedly no small thing if the fiction allows the presentation, under a form of simple imagery, of very accurate and complex fundamental ideas which could not be expressed so fully except with considerably more labor. The fiction is the algebra of law, and a picturesque form of algebra besides. There is as much substance in these five words, "The dead gives seisin to the living," as in an algebraic formula, and the conclusions which may be drawn from it are manifold. From a single principle, "The same tongue which has bound can unbind," the Talmudists frame a theory of evidence which is as subtle as it is felicitous. And certain Mussulman jurists explain the idea of the "lawful act" and the "unlawful act" by "An ass guiding a wandering she-camel," much more satisfactorily and a thousand times more clearly than any European jurist whatever.

Finally, precisely because the fiction does falsify reality,

it frequently happens that it is very strictly and subjectively exact, much more strictly so than any other form of thought expression. It is an essentially human tendency to refuse to believe sad events and to invent happy ones. What the lawmaker sometimes tries to do is precisely this, — to efface unfortunate realities as far as possible and to evoke the shades of fortunate realities which have not been achieved. Thus the idea of a Roman citizen taken prisoner by the enemy and led into slavery was too hard on Roman pride. Existence of such a fact was not admitted. If the citizen died a slave, it was said that he died in war and was killed on the field of battle; if he regained his liberty, he was supposed to have been at home all of the time at the head of his family and his business.

The same desire to efface the reality of an unfortunate event explains the origin of representation after death. If a father dies before the normal time, before he has had a chance to secure his share of an inheritance, his children are left in a sorry situation. The law resurrects the spirit of the dead man — “*mortui præsens imago*” — and everything goes on as if he were still living and able to go himself and draw his share.

This thesis could be illustrated by thousands of examples taken from every legal code. While the fiction is a subtle instrument of juridical technic, it is also clearly the expression of a desire inherent in human nature, the desire to efface unpleasant realities and evoke imaginary good fortune.

II: *Historical Function of the Fiction.* Suppose that in order to give the impression of being most practical and reasonable men, we proposed no longer to use metaphor in our speech and to abandon its use entirely to poets and litterateurs. Unless we returned to a state of childhood — and even then! — we would be none the less compelled to employ speech made up in great part of metaphors, for

each abstract term comes from one or more concrete terms. When we wish to make the meaning of an old word more exact, we return to this metaphorical origin and the word, though worn by usage, immediately assumes fresh life.

Now the fiction has played a part in law exactly identical with that of the metaphor in language. A whole world of fiction has gone toward the making of juridical ideas which seem to us most practical and familiar. The legal systems which were the richest in imagery at their origin are today the richest in precise and learned conceptions, and it was by passing from fiction to fiction that their most important progress has been realized. If it were necessary to illustrate this truth by all the examples of it which history affords, enormous volumes would certainly not exhaust the subject. The oldest and most essential ideas are nearly all, if not all, fictitious. Marriage is a fictitious purchase and sale, the power of a father is a fictitious master's power, adoption is a fictitious fatherhood, in certain respects the last will and testament is (at least sometimes is) a fictitious adoption, legitimation assumes fictitiously a marriage which never existed, etc. It would not therefore be inaccurate to claim that our reality is simply fiction differentiated, and that at bottom all law is reduced to a series of fictions heaped one upon another in successive layers.

Tiraquellus, the skilful and distinguished jurist of the beginning of the sixteenth century, put an interesting case which was discussed a long time in scholastic circles. The owner of a piece of real estate held in trust to be handed down in male entail in order of primogeniture has a son by a concubine. Immediately afterward he marries another woman of good moral character by whom he likewise has one or more sons. His legitimate wife dying, he marries his former concubine and by this fact gives his bastard the benefit of legitimation. Who will

be the "primogenitus," the "primum natus," that will succeed to the real estate in question?

There is in this problem but one real and certain physical fact, — the birth of the bastard before the legitimate son. The two relations of paternity are presumptions; but the legitimate paternity is more fictitious than the natural paternity because it rests upon a presumption "juris et de jure." Since marriage is a simple legal formality, it depends purely and simply upon the will of the law and has no other effects than those which result from the legal system as a whole. Finally, the legitimization by subsequent marriage which causes the bastard to be considered as legitimate since his birth, is a fiction, but a fiction which contradicts not a physical fact but a legal provision. The conflict depends therefore not upon the real or fictitious nature of institutions, but upon the scope the lawmaker intended to give them. Many old authors consider the fiction, "retroactivity by legitimization," ought to yield to marriage and paternity, which they consider real facts, while the fictitious element is of almost equal weight in the opinion of others.

This proves that very old fictions are no longer considered as such. All of our institutions were of a fictitious character originally; if one would try to strip the Law of every fiction of the past as well as of the present, not much would be left. Such is one of the chief elements of its historical function.

A propos of Roman Law, Savigny has brought forward another element of this historical function. "If a new juridical form is produced, it is at once connected with a previous form and thus shares in its improvement and development." Thus the Roman prætor effected numerous and important reforms in an extremely simple way and without affecting ancient principles. Among his fictitious actions, he assumed that a foreigner has the qualifications of a citizen; that possession, in certain

instances, has been a fact a much longer time than it really has; and so on. And so an alien's title, or a bare legal title, might become a full beneficial title, without the necessity of any legislation whatever. Even Justinian, who often declares himself hostile to fictions, occasionally found the process very convenient for the purpose of effecting sometimes the most important reforms. The restoration of the dowry to the wife at the dissolution of the marriage was effected before his day, in one way when there had been a solemn stipulation at the time of the bestowal, and in another way when there had been no such stipulation. Giving preference to the first procedure, Justinian in his lofty style confines himself to making a declaration in favor of fiction: every woman will always be regarded as having made the stipulation. He could have pointed out the new legal process of settlement in detail quite as well by avoiding the fictitious form. That would probably have been more difficult for the framer of the law and also perhaps for the interpreters; but the substance of the law, in so far as it concerns the position of wives, would have been absolutely identical. This is what many authors have not been able to see. "This is the special privilege of the dowry, that the wife can lie with impunity and say: 'When you married me, you promised with a solemn promise to deliver over to me a dowry,' and yet it is not true," says an old lawyer, who in company with others sees a privilege to the wife in what is only a liberty taken by the lawmaker with the form.

The fiction by which formalities that have not been observed in reality are considered to have been, is of all times and all places. Is there any need to point out that it is by this means that the formalities relative to the sale disappeared from old French Law, to give way to the principle that the sale is effected by the sole consent of the parties?

III: *Logical Value of the Theoretic Fiction.* In order to simplify the solution of a mathematical problem, there is very often introduced into the calculations data which are totally foreign to it, and this is true even in the simplest operations in arithmetic. If I wish to divide forty-five hundred by five hundred, I can commence by reducing them to forty-five and five, first dividing them by one hundred. Now the number one hundred was foreign to the problem as it was stated. In the solution of algebraic equations any quantities whatever are introduced at every turn, which by multiplying or dividing the two members simplify them without changing their value. In geometry, each person constructs, according to his fancy, upon the main figure, as many accessory figures as he pleases, to enable him to solve the problem. It is a question, to be sure, of never losing sight of what is given as true, or is so by hypothesis and construction, and of what is true by demonstration. Juridical fictions are of an absolutely identical nature. They cannot falsify a process of reasoning so long as one does not forget what they have in them of the relative, and so long as one can calculate to what extent they represent real, and to what extent imaginary, dispositions. And this is never very difficult.

Even if incapable of drawing a circle, I may be much more capable of demonstrating a theorem upon the circle and making its properties understood, than a person who with the aid of a compass draws an incomparably more regular figure but is ignorant of every element of geometry. With a deformed and hence absolutely fictitious drawing, an absolutely faultless course of geometrical reasoning may be established, while absolutely false calculations may be based upon a faultless figure. Geometry knows very well that the radii of a badly drawn circle, equal by fiction, are very unequal in reality, but that is no obstacle in its calculation.

Can it be true that the jurist is of such a rudimentary mentality that he cannot perform the same mental operation? If a jurist were found for whom it was difficult to grasp the exact import of fictions, one who was incapable of understanding what the artifice may legitimately give and what it may not, he would do well to renounce law, as well as every other abstract science. But among those who have called down maledictions upon the fiction, there is not one who was not capable of understanding it and of driving from it every legitimate and desirable benefit.

A fiction, be it understood, is only a juridical 'construction' like any other. It represents the law both good and bad, but has no claim to create law. To try to make strict and logical deductions from it is nonsense. If it is very good, it will outline concrete provisions of the law wonderfully well; if it is bad, it will outline them very clumsily, and it will be necessary to complement it with a great number of exceptions in order to give it its correct value. In either case, every one should know whether he believes it useful or not to take advantage of it. In any case, one must steer clear of the belief that a fictitious construction is opposed to a real one. Every juridical construction is simply a question of form, hence arbitrary and artificial. The fiction is a form created by the imagination and may have its advantages and disadvantages; logically, it is absolutely identical with any other form. Every theoretic fiction may be resolved into a series of concrete disposition of which it is simply the clothing.

IV: *Fiction as a Kobold*. It certainly seems that such was pretty much the opinion of the great jurisconsults of the classical period of the Romans. Caught between the practicing lawyers who always have a tendency to exaggerate the scope of principles, and the philosophical men of letters or other laymen who despise and ridicule them, the jurisconsults knew how to preserve their equilibrium. While handling with elegance and skill a world

of fictions, they were never their slaves. They nearly always escaped the danger of being deceived by the form, and evinced neither sympathy for nor any particular antipathy against positive procedure.

Besides, it is very probable that not having exactly the same intellectual tendencies, if they had been asked what they thought of juridical fictions, they would have given quite different answers. Papinian seems to be the only one who revealed — very vaguely, however — his opinion in this matter. As the few words which express it have been very often invoked in the systems of early Romanist jurisprudence, it will perhaps be useful to make mention of them. It is in fragment twenty-three, XXVIII, 21, that we see for the first time, we believe, the “*veritas*” placed in contrast to the “*imago naturæ*.” A son has been emancipated by his father; he is immediately adrogated by him so that he might logically be considered no longer a natural but an adopted son. Papinian takes the contrary position: one can never be the adopted son of his real father; he always remains his natural son, for the image ought not to obscure by its shadow the reality; the fictitious paternity created by the adrogation ought not to supplant the natural paternity, the real fact: “For in *nearly* every respect, it is fitting that it should be thus observed that a son should *never* be understood to be the adopted son of his true father lest the truth should be obscured by the image of nature.”⁹ The placing of “*fere*” in opposition to “*numquam*” shows that the jurisconsult attached no unusual importance to his principle. But once detached from its foundation and also, perhaps, with one of its terms slightly corrupted, the maxim “*ne imagine naturæ veritas adumbretur*” has found a degree of success to which it did not aspire in the beginning.

The kobold of the fiction and the classical Roman jurisconsults, on the whole, lived happily together. But it

was otherwise in the Justinian legislation. The kobold and the lawmaker are often at war, and as soon as the lawmaker drives out the kobold, it again obtrudes itself upon him. If we suppose that one and the same jurist framed the numerous laws that we place under the name of Justinian, this jurist would be perfectly incoherent in his ideas upon the function and the value of the fiction; which is, moreover, quite possible. It is more probable, however, that the imperial texts were framed by different jurists who disagreed upon this particular point of juridical logic. The aggressive tone of certain texts allows us to judge that it is very much more a question of controversy among the living than of recrimination against the dead.

In the Middle Ages the fiction could not but gain in prestige. It was officially recognized in the logic of the Romanists and the Canonists. A theologian has remarked that the fictions contained in the Bible or in juridical texts agree exactly with the ten "predicaments" or "categories" of Aristotle. Thus the fiction, upheld by the three most respected authorities, the Bible, Aristotle, and Justinian, could not be condemned. Nevertheless, it was welcomed without any great enthusiasm and suffered, moreover, entirely unjustifiable restrictions. The two most important have followed the doctrine of the Romanists through the centuries, and traces of them might be found in recent works:

"Two fictions upon the same point do not compete."

"No fiction can sanction a natural impossibility."

Neither Bartolus nor Cujas was an enemy of the fiction. Bartolus treats of it at length and nearly always justifies it, but his interminable distinctions are more subtle than logical. While devoting less attention to it, Cujas has a better opinion of it. "Since in the matter of sale, property is transferred without formality by taking for granted solemn deliveries which have in reality been dispensed with,

why should it not be the same in the matter of a donation?" Cujas seems in nowise impressed with the necessity of restricting the scope of a juridical fiction.

Heineccius inaugurated fiction-phobia in the eighteenth century. The nineteenth century suffered seriously from it. Its evil effects are still felt today. It would be more diverting than profitable to review the literature which has been produced by this mental attitude! To finish our account we will allow ourselves a single example:

How much ingenious toil has been spent to explain the nature of a corporation, or artificial legal person, without resorting to fiction! One eminent jurist thought that he had found a *real* solution. "It is not necessary to consider an artificial person as a fictitious being," says he. "The law creates it by robbing natural persons of a part of their legal personality, with which it then reinvests the corporate person in which they are merged."

A law which takes men, robs them of their personality, and reinvests a corporation with it — this is a remarkable way of avoiding fiction and sticking to reality! Is there indeed some surgeon's office in real life where this bizarre operation is performed?

§ 4. *The Procedural Fiction.* Discussions upon theoretic fictions give rise to laughter and not to tears. When even the most distinguished minds confuse form and substance, when they perform acrobatic feats in order to avoid a form which does not please them, there is no great evil done. Merely, respect for logic demands our opposition. Very sad, on the contrary, would be the chapter on procedural fiction if we had the time and the talent to develop it as it should be developed. The procedural fiction reduces to an incalculable extent the moral value of applied law. The sincere and honest men who have cursed courts and juridical science because of it would form a legion. And the worst of it is that there is no one to blame for this. Procedural fictions are made in order

to insure regular and imposing progress instead of practical justice. And thanks to it, judicial decision is able to preserve a respectable and dignified attitude. Abstract justice, honesty and good faith sometimes pay dear for this; but there is no way of making it otherwise. Procedural fictions betray the eternal weakness of the law.

Of the law? Is it Law alone which must be brought to trial? When law and history are produced at the same time, it is well known that the judgments of history are worth no more than those of law. The same crude and artificial processes necessary to put one in touch with reality are found in both, concealed in one, openly avowed in the other, but nevertheless identical.

In order to understand, a certain degree of intellectual stability is needful, and stability cannot be obtained except at the sacrifice of truth. Truth is in a state of perpetual oscillation; its mobility, its variety is disconcerting. We cannot grasp it without falsifying it. It is by the aid of assumptions — that is to say of fictions — that we estimate the value of the past and the present, attributing to specific groups of human beings good and bad qualities which they often do not possess at all.

In order to apply the law to the fact, the judge ought to substantiate the fact. He should substantiate material facts often difficult to establish, and psychological facts almost impossible to investigate. Were there but one litigation to be decided in the whole course of his existence, it is not at all certain that the most clear-sighted man could gain a perfect knowledge of all the elements of the fact which he was to evaluate. But, taking into consideration the number of matters which pass under his eyes, the most conscientious judge can have only an extremely vague knowledge of each of them. He can get through only by means of fictions.

I: *The Fiction in Ordinary Proof.* Even when brought into the most direct contact with reality, the judge

reasons according to fiction. He recognizes certain human types, as well as certain economical and social facts. By his experience and by his reading he creates for himself an artificial world from which he cannot be drawn. Thus the chief effort of the lawyer is to adapt the facts to the schematic conception towards which the judge is inclined and by which alone he is enabled to form an idea of the reality.

Moreover, since the beginning of the nineteenth century, the lawmaker seems to have given up concerning himself seriously with the reality of facts, especially in civil matters. The judiciary organization, the theory of proofs and the procedure of all modern peoples seem to advise the judge to make an appearance of being interested in the investigation of the truth but to be concerned with it fundamentally to only a very moderate extent. Let us take the French legislation. The Court of Cassation should judge only questions of law. It rids itself as much as it can of all suits submitted to it, however flimsy its pretext that a question of fact is the only one at stake. The sovereignty of the trial judges in issues of fact is its favorite subterfuge. The sovereign trial judge forms his conviction as he pleases and may declare himself convinced without saying why. He may ignore competent witnesses, interpret writings the wrong way — which may happen even when he acts in good faith — nevertheless his decision rests supreme. This sovereign may be no more than a justice of the peace. So much for judiciary organization.

The theory of proof in the French Civil Code is extremely rigid and formalistic. There proof by witnesses is excluded as far as possible. The obstacles put in the way of the disclosure of the truth are numerous and frequently disguised. Will it be said that the lawmaker wished to give preference to the more certain and less dangerous written proof? That is correct; but it

must also be borne in mind that the one who is best entrenched from the point of view of the written proof is the one who has foreseen the lawsuit and laid a trap for his adversary.

Finally, the procedure of the trial is especially open to criticism. By its crude organization it lends itself to all kinds of fraud. If anyone thinks my judgment severe, let him go back to the "Style de la Chambre des Enquêtes" of the Parliament of Paris, as it was applied in the fourteenth century, and let him compare it with any modern procedure. The intelligent minutiae which were formerly brought forward in the investigation of the truth form a striking contrast to the present-day easy-going methods. Will it be said that experience has condemned the old procedure which was long, expensive and inclined to develop false testimony; and that our modern principles are more satisfactory in all respects, seeking as they do the truth only within the limits where its attainment is practically possible? This is not my opinion, but it matters little. I do not intend to criticize any person or any institution. My only desire is to bring forward into full view the purely fictitious character of decisions relating to "questions of fact," even in cases where the judge has entire freedom in weighing the proof.

II: *Presumptions*. The lawmaker has so fully taken into account the painful situation in which the judge finds himself in dealing with facts, that to spare him any compunction, the lawmaker very often follows in the path of the fiction himself and conceals under its authority a process which is open to criticism from a logical point of view. This is the "raison d'être" of the legal presumptions.

The question whether or not legal presumptions are fictions has been debated for centuries, and since the time of Baldus and Jason, the majority of authors answer in the negative. The fiction, say they, invents out of whole

cloth a fact known to be false, while the presumption is employed to decide doubtful questions.

These two ideas — it must be recognized — are not to be identified with one another, a fact which authorizes the assigning of a special name to each of them. Each remains head of its own terminology; let us, therefore, avoid any quarrel of words. The essential point is to know in what the fiction and the presumption are alike and in what they differ.

The presumption does not state as true a fact which is known to be false. The presumed fact is a possible, sometimes even a very probable fact, and it is not therefore a fictitious one. But the presumption attaches to any given possibility a degree of certainty to which it normally has no right. It knowingly gives an insufficient proof the value of a sufficient one. Hence, by reason of the fragment of more or less important proof which it adds to the real proofs, it forms a work of the imagination identical with the fiction. There is the creation of something that is false and is recognized and presented as false.

And this applies to every kind of legal presumption, whether it can or cannot be combated with proof to the contrary.

Let us take, for instance, the responsibility of tenants in case of conflagration. A fire breaks out in a house rented by five tenants, and it is not known where it started. Article 1734 of the French Civil Code declares that each tenant will be held responsible for his share. It is scarcely probable, not to say impossible, that the fire started in the five apartments at the same time. For the five different possibilities, among which a choice cannot be made, there is substituted a fictitious fact which alone permits of a solution of the matter. Everyone has the right to attack the fictitious fact by certain means of proof, but if this cannot be done, it is the fiction that will dictate the solution.

In the presumptions "*juris et de jure*," the fictitious elements are all the more powerful, since they cannot be combated. The existence or the non-existence of the presumed element becomes a matter of indifference. Therefore "non-existence" is equivalent to "existence," as in every fiction. The fact that the "non-existence" is not certain may be suggested, but scarcely changes the nature of the reasoning, for it is this relationship of equality established between the true and the false that gives the fiction its unique character.

Let us take again the example of the Justinian fiction in regard to the stipulation the wife is supposed to have made for the purpose of controlling the restitution of her dowry at the dissolution of the marriage. Whether there had or had not been such a stipulation, the process of settlement will be the same, and Justinian points this out to us in detail. It is evident that three cases may present themselves; the existence of a stipulation, the doubt of it, and the certainty of its non-existence. The assimilation of these three hypotheses constitutes the fiction in itself. Zasius, in trying to establish a distinction between presumption and fiction, only established more firmly the identity of their nature:

"To this Zasius here adds that suit over the stipulation of a dowry is instituted by a threefold method of procedure: I, if a true stipulation took place, then the action proceeds rightly and from a true stipulation. II, if it is doubtful whether the stipulation really took place, then the action proceeds from a presumed stipulation: because the law presumes that the stipulation took place. And it is a presumption of the law and concerning the law against which proof to the contrary is not admitted. And III, if it is certain that the stipulation did not take place, then the action proceeds from a fictitious stipulation when the law fashions a stipulation which never took place." ¹⁴

SUMMARY OF CHAPTERS X AND XI

§ 5. *Conclusion: Rôle and Value of the Rational in Law.*

The law is very rich in rational processes of the intellect. Analysis, brocard, definition, analogy, 'construction,' and fiction do not exhaust the list; and the subject might easily be treated more thoroughly and at greater length than we have treated it. Nevertheless it must be acknowledged that these various processes form a good part of juridical technic, and from them the whole may be judged.

They present all the characteristics of reason. They are always justifiable, and often ingenious and subtle. They indicate forceful and accurate mental activity. Juridical thought has a right to respect and admiration. One could not make too strenuous an attempt to fathom its complexity and variety. In my opinion, the great jurisconsults are intellectually the equals of the greatest thinkers in any field no matter what.

Nevertheless, the expressions "*juridical science*," "*scientific Law*," etc., always make me rather uncomfortable, at least, when these expressions are used for the sake of convenience and with no claim to precision. For the law is nothing but reason; and reason is not always science. Law is intellectual life, and the life of the most reasonable man is not determined by a succession of rigid and scientific decisions.

In other words, not one of the processes we have studied necessarily imposes itself on any juridical hypothesis whatever, and not one of them necessarily ends in a single strictly determined solution.

This justifies, it seems to me, the term "the rational and non-logical intellectual" which I apply to one of the most efficient forces that has contributed to the development of the law.

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CHAPTER XII

THE HIGHER ORDERS OF JURIDICAL THOUGHT

§ 1. INTRODUCTION.—§ 2. PRINCIPAL SOURCES OF CONFUSION AMONG LEGAL THEORISTS: I, LAW AND LEGAL INSTITUTIONS; II, POSITIVE LAW, DESIRABLE LAW, THE JUST, THE GOOD; III, GENERAL LAW, JURIDICAL CATEGORIES AND CONSTRUCTIONS.

§ 1. *Introduction.* We have laid stress upon the lower forms of juridical thought. In everyday life, the mystical and the simple rational are the most in evidence and perhaps even the best ordered. But to stop here would be to disregard the Law and its history. In juridical development, intellectual forces of a much higher nature have been at work. These it is impossible to neglect.

It is certain in the first place that, ever since there have been thinking men, law has been in continual contact with religion, morality and philosophy. Every system of philosophy has apprehended juridical phenomena after its own fashion, and every jurist of any importance has had his own conception of the world. From one direction or another, the greatest minds of the human race have been brought to bear upon the law. It is impossible that nothing should remain of this colossal labor which is worthy of our deepest respect.

There has certainly resulted from it an immense body of literature to which a great number of different civilizations have contributed. Works treating of the philosophy of the law under one form or another are always deserving of great attention whether they emanate from theologians, philosophers or jurists. The Law itself in its con-

crete elements bears the forcible imprint of this learned and systematic labor.

Philosophy is not to be found entirely in the thoughts of philosophers. All human beings — or nearly all, at least — can rise to the most general and abstract conceptions. Thus lawmakers, practitioners, and publicists, who deal by preference with the lower forms of thought, may more or less frequently, through their own efforts or some outside influence, come in contact with the most delicate elements of juridical thought.

Nevertheless, Legal Philosophy is at the present moment, and has been for a long time, universally decried, nay, more frankly, despised by the very large majority of jurists and philosophers. It is looked upon as a form of empty phraseology, often insipid and devoid of interest. It must be acknowledged that this reproach is often justified. We have no intention of joining in this depreciation, nor of even vaguely criticizing the various systems of legal philosophy. Acting in the capacity of legal historian, we are brought face to face with an important and inevitable problem: *i.e.*, What is the character of the philosophic thoughts which have had an influence in the formation of the law? We must know how to approach this problem.

What ought the law to have gained by this continual contact with philosophy? It ought, above all else, to have gained a better understanding of itself. It ought to have disentangled the various elements of which it is constituted, determined their nature and estimated their logical value. Yet the law is in almost complete ignorance as regards itself. It is composed of ideas which are, from a philosophical point of view, diverse by nature, and every system of legal philosophy mixes them into an incoherent mass. So that the situation presents itself in the following form:

From the point of view of system, works of juridical

philosophy are characterized by the wildest confusion in the essential ideas; so much so, in fact, that no system, in so far as it is a system, may really be classed among the higher forms of thought; accordingly they may all be neglected here. *

But every isolated thought contained in this intellectual chaos preserves its own peculiar nature, and it is this in itself which it behooves us to evaluate. The fact that no one has been able to characterize these thoughts, or to turn them to account, does not change their value. Very often true and deep ideas are emitted by minds incapable of making use of them. They are none the less true and deep although not utilized. To take a survey of moral and political theories and of natural law through the ages would certainly be very interesting, but it would serve no purpose in the understanding of juridical thought. For these theories, in so far as they are theories, have no truly philosophical interest. To unfold ideas without being able to appraise them, without a criterion to aid in the understanding of their scope, the degree of authority which they may claim, or the relationship which they have with one another, would be labor in vain.

In order to get a standpoint in this chaos of juridical thoughts, analysis alone, and the most rigorous analysis, is necessary. We make no pretence of taking up this analysis at its beginning, for it was started a long time ago, nor of following it to its conclusion, for undoubtedly our labor will still remain very crude. But those who might wish to undertake it in whole or in part would certainly perform a work which would not be unwelcome to us if they could instil into it more subtlety and logic.

§ 2. *Principal Sources of Confusion among Legal Theorists.*

I: *Law and Legal Institutions.* It is generally understood that "law" and "legal institutions" are not synonymous. But the distinction between the two is not

nice enough to bring out all that it is capable of furnishing. And — what is more serious — when one emits a general theory on a matter of juridical technic, philosophy or history, there is nearly always an omission of any indication as to whether it is applicable to the “law” or to “legal institutions.”

In its positive form, the law (*Droit*) is the ensemble of the rules formulated by laws (*loi*); the institution is the ensemble of the processes by which a social aim, or, if it is preferred, the form of social relations, is realized. An institution becomes juridical when it is submitted to the basic rules and the technic elaborated by law. Sale is a juridical institution, while an invitation to dinner is not.

Institutions are older than the law. Animals have institutions but not law. Primitive peoples develop very complex social life almost without the aid of law. Primitive Roman law had not, strictly speaking, any family law; and its law of contracts admitted institutions of commercial life only with many restrictions and reservations.

Institutions enter and depart from the juridical domain according to circumstances. The law may permeate them more or less thoroughly, according to the epoch and civilization. Thus marriage has been regulated by laws to a very unequal extent. The details of conjugal life give, in some environments, occasion for suits which judges would refuse to recognize elsewhere.

Even if an institution may be completely analyzed into juridical dispositions, it preserves its independence throughout. No matter how close the union may be, such a separation is always possible.

Law and institutions have their cause and their essence in psychological phenomena which in nowise resemble each other. The same principles cannot be used to explain the history and nature of the two. A fundamental distinction must be made to avoid confusion.

II: *Positive Law, Desirable Law, the Just, the Good.* It may seem useless to draw attention to the distinction, which should be made by anyone who studies law from no matter what point of view, between positive and desirable law. Confusion between "pointing out what is," and "discussing what ought to be" would not seem to be within the range of possibility except by unusually dull minds. Everybody recognizes in principle that this distinction is well grounded; but in the course of a long exposition, it sometimes happens that an author changes his point of view without warning. Hence, most deplorable obscurity arises. Those who insist that these two orders of ideas should not be mixed at random are right.

In order to give an accurate meaning to the expression "desirable law" or its equivalent, it is indispensable to lay down certain delicate and important distinctions. "Desirable Law" may be defined as the ensemble of juridical dispositions upon any specified subject, which under any specified circumstances, it seems *expedient* to establish. The word "expedient" is, without doubt, far from being clear. It is vague and obscure because the idea which it represents is vague and obscure. "Politics" might be called the search for desirable laws, and a "politician" one who devotes himself to this search. The politician asks himself whether it is expedient to establish new or to abolish old laws. However complex and arbitrary his labor, its various phases may, nevertheless, be analyzed.

The politician should, in the first place, combine the elements of decision, and, in the second place, make a decision.

(1) *Elements of Decision.* The elements of a decision are, from the philosophical point of view, of a very varied nature, but they may be classed in two groups.

(a) An investigation into the moral or material consequences which should result from a law.

(b) An examination of the law and its consequences according to the principles of what is good and just.

(a) An investigation into the effects of laws could end, in our times, in but very uncertain results. The combined efforts of all the social sciences brought to a state of perfection could alone promise us any foresight into the future. Some of these social sciences (political economy, statistics, history, etc.) have attained a certain degree of development; others are scarcely outlined, while others still are completely unknown to us.

It is very possible that humanity will disappear from the face of the earth before it accomplishes the colossal task which remains to be accomplished in this direction. But it may be affirmed that theoretically the knowledge of the moral and material effects of laws may be attained definitely and completely by the use of sciences which are exclusively positive. The difficulty lies solely in the complexity of the problem and not in its nature. It ought to be solved by the use of positive and experimental methods. It is therefore scientific in the strictest sense of the word.

(b) Of quite a different nature is the examination of the law and its consequences according to the principles of the Good and the Just. For the Good and the Just have no positive existence, being in the eyes of some, simply creations of the human brain, while for others, they are realities higher than man himself. Since no positive method can convince either side of error, the solution to be applied to the problem of justice will always remain hypothetical. It is a metaphysical question which we shall never settle with certainty. Any truth we can draw from it will always remain a metaphysical truth.

Those of a positivistic mind can claim that an examination of laws according to metaphysical data could be simply and absolutely abolished. But as a matter of fact human nature needs, and will always need, such ideas as

a basis of its social logic. Those who believe in the purely subjective nature of the good and the just are no less obliged to give them an artificial objectivity through fiction, for without that any estimation of the value of laws would be absolutely impossible. Fictions or realities, the good and the just will always be studied by the same method, very far removed from the positivistic methods.

(2) *Decision.* When the politician has combined the elements of decision it remains for him to make a decision or formulate a judgment. He will say, "It is necessary," "It is expedient," or "It is desirable." Logically, a decision cannot be the direct result of even a perfect knowledge of the elements. Practically, if all the elements of the decision are favorable, the decision will seem to force itself. But this is only an expression; a decision can never be logically forced by the verification of facts. Intellectual facts and volitional facts are related in fact but not in logic. Besides, the examination of the elements of decision will nearly always bring to light so called advantages and disadvantages. In such a case, no intellectual labor can justify a choice. A law will be unjust but useful; just but dangerous; there is no discipline which could inform us whether we must give preference to the just or the useful when both are equally involved; there is none which could show us what degree of justice or utility ought to control in case of opposition between the two. The art of decision will always remain outside of all positive logic as well as of metaphysics.

Thus it is seen that in the fashioning of desirable law, three psychological processes are combined; the first, of a positive and experimental nature; the second, metaphysical; the third, foreign to the strictly intellectual domain.

III: *General Law. Juridical Categories, and Juridical or Philosophical 'Constructions.'* Works on pure and abstract law and on juridical dogmatics comprise a rich

body of literature, a legitimate resource in the investigation of the highest forms of juridical thought. Do not these works in themselves constitute the science and, up to a certain point, the philosophy of law? Undoubtedly. But whatever may be their profundity or their scope, it is very seldom that works of this nature can rightly repel the charge of confusion due to lack of analysis, not perhaps in accomplishing the task itself, but in pointing out the task which they propose to accomplish.

In the domain of juridical theory, there is room for many enterprises of a varied nature and purpose; every one may exploit his own field in his own way. Still it is necessary to know what each one is trying to do and what harvest he hopes to reap. Without this, how can one judge whether he is right or wrong in what he affirms or denies?

(1) *Motives of Study.* The philosophic nature of juridical thought may be studied with a great many different motives. Some wish to understand it for its own sake; others for the purpose of influencing the interpretation, creation and application of positive law. Both may conscientiously follow identically the same methods in their labors; provided, however, that the practitioner of the future does not happen to mix his practical desires with objective and disinterested study, — does not arise from his seat every time that he supposes a philosophic truth may be of use to him. If he mixes the preoccupations of his profession with his study of pure science, he will no longer have the right to claim to practice his profession according to the principles of pure science. This is why “a scientific elaboration of positive law” supposes, in the first place, a scientific knowledge of law, after which may come a scientific study of the “elaboration.” But a study of *the elaboration of the law* cannot be considered a primary science. For that would lead perforce to the elimination of everything in the philosophic nature of law

that did not seem of possible practical use in its elaboration. He whose ambition is limited to becoming a notary or a deputy sheriff has a perfect right to choose in his juridical studies what best suits his profession. But he cannot pretend to rise to scientific law. The situation is proportionately the same for him who tries to fashion a theory of "legal elaboration" without knowing the law itself.

The author with whom we are dealing and whom we appear to be criticizing directly, when in reality we have many others in mind, has done much toward the understanding of the law itself as well as for the technic of "the elaboration of the law." But the high value and universal renown of his work induces us to take it as a sample of the insufficiency of the power of analysis in modern juridical science among the most profound minds and those most desirous of penetrating deeply into the philosophic essence of juridical phenomena.

Let us admit that there is a philosophic reply to the question "What is the most perfect method for the elaboration of law?" but this reply can be obtained only by him who has examined fundamentally the elemental question, "What is law?" One cannot logically approach the former before exhausting the latter.

(2) *The Science of General and that of Necessary Elements.* By reserving the expression "pure law" or "positive legal philosophy" for the science which confines itself to the investigation of what law is, there is at once secured a basis for labor which is more exact than those in general use. But much confusion is still possible unless there can be still further precision, for works differing in method and scope cannot be brought together under the same head.

To combine the possible maximum of juridical data by borrowing from every age and every civilization, and to extract therefrom the common elements, — to work thus

by means of observation, abstraction and generalization, is a method as solid as it is fruitful. It may be called the method of "general positive law," for it condenses all that is general in positive law. It sorts out the accidental and the permanent, the variable and the constant. Its results have a positive and experimental value of the highest order. They constitute the science of "general elements" of the law.

The science of "general elements" should not be confused with that of "necessary elements." Now, certain thinkers affirm that there are in the law "necessary elements." If there are such, it is behooving to erect an entirely new science. Up to the present time, no one has concerned himself with anything except what was common to every juridical system of the past or present; now it is a question of discovering what is inevitable in every *possible* or *imaginable* juridical system. Between the two sciences there is a deep gulf fixed; for there is indeed a deep gulf between what has always existed and what cannot but exist, between the "general" and the "necessary."

In studying the "necessary," the experimental and inductive method must be completely abandoned; neither can observation, abstraction, nor generalization be of any use, no matter how perfect or how exhaustive they may be. What has never been a reality since the world began may become a reality tomorrow, and, however minutely the past may be studied, one cannot find in the things which have there become realized any indication as to the possibilities and impossibilities of the future. The necessity of a juridical idea, — the impossibility of its contrary, cannot result from experience. Its proof must be sought in different directions.

(3) *Threefold Nature of Juridical Necessity.* The necessity of a juridical idea may be of a *psychological* nature. The conformation of the human brain creates inescapable,

i.e., necessary modes of thinking among all men; so that one may conceive of certain social principles which are imposed by the fact that men of yesterday, today and tomorrow will always be, to a certain extent, similar beings intellectually and emotionally. If one believes in the possibility of determining the extent of variability of which the human mind is capable, then may one fix the limits beyond which it is impossible to go. These limits will be those of necessary psychology. For example, men obey laws because these laws are sanctioned by the punishment of those who violate them. Without such sanction, laws would hardly have been obeyed in the past, nor would they be in this day. Can one imagine a state of society where men as we know them would observe the restrictions laid down by the lawmaker if disobedience did not bring them into trouble? It may be assumed that this is an impossibility and that in order to make his orders respected, the lawmaker will always be compelled to accompany them by sanction. The contrary may likewise be assumed, and neither of the two opinions is absurd in itself. It is simply a question of the appraisalment of man's psychological variability. This is the case with the calculating horses. When the claim was made that certain horses were, through education, capable of extracting square roots and using logarithms, many minds were quite certain in advance that it was simply a matter of trickery. And rightly. The psychology of the horse has not been described scientifically, nor the power of his intellectual variability measured. Nevertheless it is perfectly legitimate to fix, by approximate estimation, the limits beyond which the intelligence of the horse cannot pass. What is true of the horse is true of man. Such is the nature of the psychological necessity which is very often invoked implicitly or explicitly in legal philosophy. The deductive necessity which is likewise frequently invoked is in nowise similar. Its nature is purely artifi-

cial. When an investigation is made of the consequences resulting from a principle propounded as certain, it is based upon deductive necessity. Given a definition of law in which the idea of sanction is implicitly or explicitly contained, and by virtue of this definition the law and the sanction will always remain indissolubly connected. Thus for those who consider sanction as the specific difference between law and morality, it is absolutely certain there will never be a law void of sanction. Whatever transformations may take place in the human mind, this will always be so. If the day ever comes when men obey laws without constraint and simply for pleasure, and when tribunals, policemen, and prisons become absolutely useless, there will no longer be sanction, but neither will there be law, and the body of rules to which the citizens of a state or community will submit will be something essentially new to which a new name will have to be given. We are here confronting *deductive necessity*.

Finally, it may be claimed that certain elements of the law have a *categorical necessity*, that is, they are of the same nature as are the forms of knowledge to which Kant has given the name *categories*, such as quantity, quality, and relation. These forms of thought exist even before we have any knowledge of them and apart from this knowledge. These are "a priori" truths, related to mathematical truths. From this point of view, it may be maintained that the idea of "sanction" is an element of the idea of "law," in the same way that "unity" and "plurality" are contained in the category "quantity."

The three forms of necessity, (a) psychological, (b) deductive and (c) categorical, do not exclude one another. It is possible for one and the same legal principle to be necessary from this triple point of view. But it is advisable that a very clear distinction be made between the three ideas.

Are there general and are there necessary elements of the law? We shall study this question in the next chapter. If there are such elements, it will be a task equally urgent and delicate to separate them from juridical and philosophical constructions which could never be either general or necessary.

(4) *Juridical or Philosophical Constructions.* We have already spoken of juridical constructions.¹ Nevertheless, it is expedient to return to the subject. For if modern science has a fondness for the juridical construction, ancient philosophy of law was partial to philosophical constructions. Both seem to misapprehend completely the nature of constructions.

What is a juridical or philosophical construction? The expression "construction" in itself indicates its nature wonderfully well. It brings together materials foreign to one another and taken from every direction; these it trims, arranges and joins together according to an arbitrary plan. With these given materials, it can build many very different edifices, after an infinite variety of plans.

Any particular stone may quite as well take its place at the base or at the summit of the edifice. A construction may be elegant and symmetrical or the opposite. It is always legitimate. But it is never false or true, since it is a work of the imagination and should always be presented as such.

Again a juridical construction might be compared to a game of cards. There are artificial and conventional combinations which may be modified "ad infinitum," and they are all equally legitimate. There are games that are more or less simple or complicated, more or less amusing or tiresome. There are none at all that are true or false. It is not easy to invent a new game that is amusing,

¹[*Ante*, Chap. XI, § 4, where the peculiar Continental meaning of this word is explained in a footnote.—ED.]

just as it is not easy to imagine a pleasing construction. The two mental operations are very nearly identical.

Construction is indispensable to the human mind. It gives an indispensable harmony to the concrete dispositions of laws, and fashions out of the scattered fragments a work that is often grandiose, and nearly always pleasant to behold. Philosophical construction is the only intellectual labor which gives man complete satisfaction, that is, happiness or consolation. There would be no crime worse than to depreciate its value. Everyone creates for himself at every instant a synthesis of society and of the universe; into this he inserts his own ideas and tastes, and justifies, and at need glorifies, all of his own acts. These general systematizations, these syntheses of moral existence, these "*Weltanschauungen*," may be morally or socially of a higher or a lower order, logically they are all equally valued. The philosopher, the artist, the priest, the banker, the bond-holder, the beggar, and the slave, all toil in the same way to fashion for themselves the universe which is necessary to them, one with which they can harmonize their existence. Each of these constructions is of service to him who is its architect. It would be dangerous to give to anyone of them a general value and attribute to it an objective character to which it has no claim of any kind.

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CHAPTER XIII

SCIENTIFIC LAW, OR "PURE LAW"

§ 1. INTRODUCTION.—§ 2. EXPERIMENTAL TRUTH IN JURIDICAL LIFE: I, TERMINOLOGY; II, MECHANISM; III, OBSERVATION; IV, JURIDICAL AND HISTORICAL OBSERVATION; V, EXPERIENCE AND JURIDICAL TRUTHS; VI, EXPERIMENTAL METHOD AND THE LAW'S DEVELOPMENT.—§ 3. JURIDICAL CATEGORIES: I, CATEGORICAL IDEAS IN JURIDICAL LITERATURE; II, JURIDICAL CATEGORIES AND THE PROBLEM OF KNOWLEDGE; III, THE FIRST ELEMENTS OF LAW; IV, DELIMITATION OF JURIDICAL CATEGORIES; V, RÔLE OF THE CATEGORICAL IN JURIDICAL LIFE.—§ 4. PURE LEGAL SCIENCE, OR THE SCIENCE OF POSSIBLE SOLUTIONS.

§ 1. *Introduction.* Under the term "pure law" we shall range the diverse efforts which have been made to arrive at a knowledge of the law by strictly logical processes. It is an expression that has been used in various senses; and since it has not yet any precise meaning definitely attached to it by usage, we may disregard the terminology of others.

First of all it behooves us to state definitely what we wish to ask of the study of works on pure law. We lay down for ourselves one question and one only. In the domain of juridical thought are there and have there always been elements which are strictly logical, and what is their nature?

Accordingly: (a) We are making no criticism of any system, author or work. We are not asking ourselves at all which of the thinkers who have worked in law from the logical point of view have succeeded best in conducting their labors to the point where they ought logically to lead.

(b) We shall consider the thoughts in themselves independently of the system which comprises them, and the

methods in themselves apart from the results which they have attained. It matters little to us whether a logical thought stands alone in the midst of errors or a good method has been wrongly employed.

(c) Our task will not be that of enumerating within limitations everything in the law which might be called logical or scientific; but of explaining the most important types which might be contrasted with the lower forms of intellectual and the simple forms of rational thought.

§ 2. *Experimental Truth in Juridical Life.* In many fields, the experimental method has surpassed all hopes. For the concrete and physical sciences it is the method "par excellence." In the sciences which affect man very closely, in linguistics and even in psychology, it has furnished the most brilliant and substantial results. There is accordingly nothing more natural and legitimate than to adapt it as fully as possible to every social science, especially to the study of law.

Of course, this has always been done more or less. The most scholastic jurists have, at times, examined existing realities or historical precedents in order to decide some question of law. Those who have seen a great deal, retained a great deal and know how to derive the most experience from life, have always been appreciated. Therefore old men have nearly always been preferred as judges. But this experience of age lacks continuity and precision, fluctuates at random, and is seldom able to create anything of substantial value. Can the experimental method be employed strictly and accurately in the elaboration of the law? Can truths that are incontestable be obtained from it? Is it of a nature to remodel the law and impart to it the characteristics of true science which, in my opinion, it has, up to the present time, always lacked? Or must we be more modest and confine ourselves to asking experience to furnish a certain amount of scientifically acquired and relatively indisputable data upon which

so-called juridical labor may be elaborated without the law itself being absorbed by experimental science and developed entirely by it?

I: *Ambiguity of Terminology in the Experimental Sciences.* It is to be presumed that those who claim to employ the experimental method understand its exact mechanism, but this is perhaps not absolutely certain. A confusion would be all the more excusable since the terminology is far from being as precise as one might believe it to be. Thus the word "experience" may be taken in several different senses; "experimental sciences," "experimental methods," and "experimentation" are so many expressions understood differently by different authors.

We shall call "experimental truth" any truth obtained by observation and verifiable by experience. We shall avoid the term "experimentation" because of its ambiguity; its place will be supplied, according to circumstances, by some other expression, such as "experimental exploration," or "experimental verification."

In Goblot's "Vocabulaire Philosophique," the terminology of which has been carefully fixed, experimentation is defined as "a method of research into natural laws." Its aim, therefore, is to discover the truth. We will not cavil over the word "laws" now; that will come later.

Experimentation consists in one or more observations of a particular nature and differs from simple observation in several points: (a) The observer, it is said, becomes the experimenter when he has already formulated in his mind a hypothesis and makes observations with a view of finding whether it is true or false. (b) He brings about the phenomena he wishes to observe instead of concentrating his attention upon spontaneous facts. (c) Finally, he directs his observation according to certain methods (method of agreement, of difference, of concomitant variations, or of residue).

Such experimentation is a means of research into natural truths, the exploration of reality. It is to be recommended to scholars as particularly fruitful. But everyone remains his own master as regards his method of work and the means he employs to attain the truth. What gives experimentation its great prestige, what secures the tremendous success of experimental sciences, is not this process of work described by Bacon, and analyzed still better by John Stuart Mill, Claude Bernard, John Herschell, and by Thompson and Tait, but applied more or less in all times. The experimental truths beyond dispute are not those which have been discovered by the experimental method, but those which can be verified and tested by experience. It is experimental testing which gives to certain truths a particular authority, the positive certainty which they could not have without it.

In certain respects, a parallel should be drawn between experimental exploration and experimental testing.

(a) The aim of experimental testing is to prove a truth already discovered. It is addressed to outsiders, to the public, to everybody possible. The inventor announces his discovery by pointing out the experiment which anyone can perform, that demonstrates its truth.

(b) Experimental testing may verify truths discovered by any kind of process, — mathematical and deductive truths and simple observation, as well as the results of experimental exploration.

(c) Experimental testing, like experimental exploration, deals preferably with artificial and specially instigated phenomena. But this is not an essential condition for either. Facts just as they occur may be utilized. Above everything else, the experiment must be easy or comparatively easy, in order to be within reach of the greatest number. A truth will have authority in proportion to the number of persons who have realized the experience which confirms it.

(d) The method of scientific investigation or exploration is tentative. A great many experiments end only in elimination of hypotheses and have only a negative result. When after a great many negative experiments, a savant has obtained a positive result and wishes to have it universally known and acknowledged, he does not have to disclose all the phases of his labor up to the time of his success. He makes the proof by choosing one or more of the experiments which he has performed; perhaps he even finds a process of demonstration outside of any of the material used in his investigations. Accordingly, the experiment of exploration and that of testing may be identical; again they may be entirely distinct. It is therefore advisable, from this point of view again, not to confuse the two at the risk of ambiguity.

II: *Mechanism of the Experimental Method.* If in his examinations, a thinker draws his principles from outside life and makes use of none except those he is able to prove by experiment, nobody, I suppose, would refuse him the title of an experimental scientist. Nevertheless, it is not certain that he always employs the same methods. He may work differently in different circumstances.

1. *First Hypothesis.* An observer proposes to investigate the relation between the appearance of the sky and the direction of the wind in a certain locality. After several years of regular observations he proves that a wind from the north always corresponds to clear weather. He makes an induction from the phenomena as a whole and uses it, to a certain extent, to predict the weather in advance. He shares his discovery with the public and every one will be able to do likewise in certain cases and within certain limits.

The method here will be based on this hypothesis: a series of observations without any preconceived idea, the process of induction, verification through experiments which, though not artificially incited, are conclusive.

2. *Second Hypothesis.* An observer holds a liquid composed of three different liquids mixed together, and he knows that this liquid is a poison. Is each of the three liquids poisonous or harmless? If he has a sample of each, it will be very simple to test them on some animal and to determine their character. Here the experiment serves to reveal the truth; but this truth once discovered can be verified by anyone who wishes to do so.

Therefore, the method here will be: observation, experimental exploration, experimental verification in case of doubt.

We find ourselves accordingly facing two methods which seek truths by observation and verify them by experiment. The first employs induction and the second dispenses with it. The former uses experimentation in the narrow meaning of the term, and the latter neglects it altogether. We will call one inductive-experimental, and the other experimento-experimental. The two are of equal logical value, but it is important that they should not be confused.

(1) *Inductive-experimental Method.* "Observation," "induction," and "experimental verification" constitute the three phases of this method. Observation is putting oneself in contact with outside life with the intention of understanding everything in it which one is capable of understanding; induction disentangles a general truth from one or more established facts; and, finally, experimental verification is a means of testing which submits the general truth resulting from the induction, to one or more proofs, thus rendering it indisputable.

The three operations taken together constitute a perfect experimental method. But they are three separate and distinct operations which may perform their functions under other circumstances.

Thus observation cannot end in an induction, but is satisfied to note the facts just as they have successively

occurred. The results of observation might end in abstractions, analyses, and classifications, which would not contain induction properly speaking. The facts observed might be of such a nature that it would be impossible to reproduce them or to have other facts with which they could be compared.

Induction, or the conclusion from the particular to the general, may be made upon all kinds of data no matter what their nature and does not necessarily assume the observation to be from outer life. The "I think, therefore I am" of Descartes is extended by the process of induction to all men, "all men think, therefore all men are."

Finally, experimental verification is not indissolubly linked with observation or induction. In the first place, it is readily applied to test the results of deductive and mathematical sciences. In the second place, certain inductions based upon observation, just as certain observations, cannot be verified by experiment. An introspective experiment might even be possible. If for example some one says, "All who behold this spectacle will be filled with astonishment," everyone may be convinced by experiment of the truth of this proposition by going to see the said spectacle.

We find ourselves, therefore, in the presence of three distinct logical operations, each of which is to be recommended for different reasons.

(a) Observation, the direct contact with nature, directed with the strictest attention and accompanied by the most scrupulous notation, is the most fruitful process for the discovery of truth. In all the concrete sciences it is the one which will give the best results. In a great part of science itself, it is almost the only one which can be reasonably employed. But it may very well happen that a good observer will find nothing or almost nothing, and that a poor observer will discover a scientific truth of the greatest significance. This would be an exception;

but it is proper to indicate it in order to show very clearly that the value of observation is only relative and that its productivity may vary considerably according to circumstances.

(b) Induction is a logical process very dangerous in practice and open to criticism in theory. It is the cause of a great many mistakes and prejudices, and is extremely difficult to handle. The two virtues of those who employ it should be prudence and modesty; but these are not always present. It is, however, indispensable in the study of the concrete sciences and may generally find a corrective in the experimental verification through which it acquires certainty and authority.

(c) Experimental verification tests truths discovered by deduction as well as by induction, but it can intervene only in relation to phenomena whose repetition can be artificially produced or which repeat themselves frequently enough to be able to be observed by everybody.

(2) *Experimento-experimental Method.* This method presents itself under many different aspects, which the logicians perhaps have not stated very clearly. It may be very simple or very complicated according to the nature of the truth to be discovered. It always embraces at the same time experiments of discovery, which the investigator makes in order to convince himself, and experiments of proof, which he points out to the public in order that the public may convince itself. The two classes of experiments may be of the same nature and identical in practice; but in theory they always remain distinct, for it is expedient to realize that their objects are different.

Whoever has discovered a truth by means of experimental research may confine himself to telling the public how he proceeded, in order that everyone might make the experiment which he has made and convince himself as he has done. He might also indicate any other means of testing that he may have had at his disposition. But if

for one reason or another the experiments made once cannot be repeated, and if no other test-experiment can be provided, we shall have certainly gained through the experimental method a belief but not an experimental truth.

Thus in the "Horla" of Guy de Maupassant, the hero, convinced that he is followed by an invisible being, makes a series of practical and ingenious experiments which prove to him the existence of this "horla." But the same tests made by others would not give the same results. The method employed is good in so far as it is a method, but it does not provide the possibility of verification; the assertions of the experimenter only meet with incredulity.

III: *Observation: Its Inner Nature and Its Progress.* One might be astonished perhaps to see observation heralded as a process of research relatively recent in the physical and quite recent in the intellectual sciences. Is not the observation of surroundings the first intellectual effort which the most limited human and even the most primitive animal could perform? Reduced to its simplest form, the observation of the oyster upon its rock, of the bee, of the dog, of the cat, of the child, of the farmer, and of the scholar are identical in nature. It is for all of them the best means of knowing what surrounds them, so far as they are able to know.

From this point of view, it is for everyone and in every situation the true scientific method.

It is nevertheless very evident that each of these beings will arrive through observation at very different degrees of knowledge, for the simple reason that they find themselves in very different material and intellectual conditions. The oyster, the dog, the child, and the farmer will perhaps pay more attention to the weather today than will the meteorologist. The latter alone will make truly scientific observations, because he alone is well equipped materially and intellectually. The quality of

the observation depends upon the quality of the material and the intellectual equipment. Every time that great changes are made in the equipment which the scholar has at his disposal, old observations and those made with the old tools lose prestige and may be completely abandoned. It is the same when there is a change in the intellectual tool constituted by the brain. Every time that the experimenter gains in precision and subtlety, he neglects the rudimentary labor of the past and believes himself the first and only true observer. Thus observation, the earliest form of intellectual activity and by far the oldest, appears to us to be always new and always just beginning.

The intellectual tool is the brain. Everything which develops the brain develops its power of observation. Now what develops the brain is not — in no case is it solely — minute attention to exterior facts. It is entirely the inner labor — memory, comparison, classification, interpretation, deduction — which is afterwards spent on the impressions drawn from reality. Moreover, this inner labor is necessarily far from always being very fortunate from the scientific point of view. It may lead the mind far away from reality into a world of abstract and often chimerical ideas. The intensity of the mental labor may cause the mind to forget its first observations or to misconstrue them and divert it from looking about.

In the history of human thought, one very often encounters disciplines which seem to make the human mind labor "in vacuo." One has the impression that this wasted effort might be better employed. Perhaps this is a mistake. Even if the object of the labor is totally devoid of interest, the labor in itself may constitute a powerful gymnastic exercise which leaves the brain stronger and more simple, and ready to observe reality to a thousand times better advantage than formerly.

The discipline of Roman law in the Middle Ages was not vain. Its positive effect on juridical technic and

social organization is tremendous. Nevertheless, it may be asked whether the services rendered by it outside of law, in the formation of the modern mentality, in the development of the power of observation, are not still greater.

It is to be remarked that the abstract forms of discipline and those termed scholastic nearly always rest upon analysis. Their favorite word is the famous "distinguo" so much decried, and it cannot be denied that practice in every kind of casuistry develops mental acuteness and subtlety. Now, the analytical power determines the productivity of observation. It is that which permits the discernment of resemblances and differences more and more delicate, and the discovery, in a lump which seems amorphous, of a judiciously disposed organism. It is the intellectual instrument which may be compared to the microscope. It is because of the inequality in their power of analysis that the animal, the ordinary man, and the scholar make observations of unequal value. Thus the human mind is a whole. It is not composed of one part deductive and false, and one part inductive and true. It is not permitted to choose between reflection and observation in arriving at the truth. For observation itself is composed of deductive elements which determine its power.

Hence it should be concluded that as far as its results are concerned, observation is worth only what the intelligence in which it originates is worth. It is not an instrument which performs its functions entirely alone. It demands accuracy of thought in order for it to be employed with safety, and analytical power, for it to be handled with profit. But in so far as it is a method, it is justified even for those who derive nothing from it or end with erroneous results. It is for everyone the only means of obtaining external truth. For this purpose, it preserves an undeniably logical and scientific character even when it is poorly conducted. It can only be asked that everyone

do what he can and employ whatever tools he has at his disposal even though they be defective.

It is expedient to make a second very important reservation. Observation arbitrarily cuts out from reality groups of facts which it causes to enter into our understanding; so that there is disclosed to us not pure reality, but an artificial world made up of real elements. In reality, the elements distinguished co-exist with a crowd of other elements that are unknown to us but often of greater importance. The elements that are more or less isolated in the body of our knowledge are thrown into a prominence which distorts them. This is a fact which must be taken into account. Thus in the creation of a historical work, certain facts are chosen to which the term "historical facts" is applied. This qualification or disqualification is purely arbitrary and subjective, and cannot have the least scientific value.

IV: *Juridical Observation and Historical Observation.* The person who wishes to know the actual provisions of any legal system and seeks to gain information concerning them by oral or written instruction, does not perform a work of observation. He confines himself to understanding what is told him or what he reads, and to recording it in his memory. It would here be the same, whether he confined himself to a single legal system or wished to know the institutions of a number of countries. The method in question does not accordingly form a part of the education of the practical lawyer.

It is, moreover, quite difficult to distinguish clearly between the jurist who learns and the one who observes. They perform the same material acts — reading or listening. But one tries to record in his memory what comes to his knowledge, while the other brings together and compares the facts which are thus communicated to him. These comparisons may result, moreover, in simple classifications or have grander ambitions. In every case the

criterion is purely intellectual and hence quite difficult to grasp. The personal effort of the worker, his initiative, does not begin with the establishment of the facts, which are furnished him by someone else, but by the establishment of relations between these facts. Hence the difference between this observation and that of the physical sciences.

Legal history, like general history, is not observation of the past, but of what has been written in and upon the past. (The subsidiary sciences, such as archæology, numismatics, etc., may be put aside.) To observe in history comes back to reading, although all reading is not observation; and, as history has always been studied by reading, the method in itself has hardly changed. But here as elsewhere the material and intellectual tools have been improved.

A great many historians have no other purpose than to gather materials or to render them more easily accessible. The search for unknown texts, publications of hitherto unpublished texts or correct editions, translations into a modern language, interpretations of texts in order to determine their true meaning, compilations of texts upon the same subjects, — all these labors, whose importance cannot be exaggerated, may be considered as improvements in the equipment of historical observation and not as historical observation properly speaking. The document is the tool “*par excellence*” of the observer in the domain of history as well as of the observer in the field of jurisprudence, and they both perform their tasks through the comparison of documents.

The historical narration which restricts itself to summing up a document or combining several documents in order to make them better known to the public is only a work of reproduction, and one that is simple in form. It cannot claim to disclose a new truth. It simply creates an implement of labor which may be of great value.

The historical critic who compares documents to check

one with the other and establish how far each is trustworthy, may claim the method of observation and the term scientific without dispute. His labors will generally end in the creation of a new implement of toil more perfect than those which have hitherto been in use.

Juridical observation may be made in the present, in the past, or in both. It is therefore historical observation also. It becomes intellectually improved by the progress of analysis and by keen insight in isolating the objects under examination and in multiplying the viewpoints from which this examination is conducted.

In juridical fields, a distinction is made between the study of diverse institutions — the social aims to be realized — and the functions of law properly speaking — political, legislative, judiciary or doctrinal. The field of exploration offered to the investigator is unlimited and only its broad classifications can be indicated.

Although the study of the relations between a juridical element and one external to the law is far from new, it has as yet no very precise name in science. Thus the relationship between marriage and the death rate, and that between primogeniture and population has attracted the attention of many thinkers. Nearly every institution has been considered in its economical, geographical and other relations. For the law properly speaking, and juridical technic, comparisons of this nature might be equally numerous and fruitful. The life, the customs, the beliefs of a people have a real influence upon the form of the law. Thus the existence of a book which is considered sacred or possesses great authority will modify the technic of the interpreter.

The comparison of juridical elements may create quite different forms of discipline, which group themselves under one or the other of the four following types:

(1) *Comparison of Co-existence.* This consists in putting alongside of one another, one or more juridical elements

which are in existence in a certain number of countries at an exact and given time. Comparative law comes in this category. In general, it consists in comparing the law in certain countries by taking it at the time the author writes. This might be done for any period whatever of the past without changing its character.

(2) *Comparison of Nature*. This consists in analyzing certain juridical elements or solutions just as they have presented themselves at any period, in the past as well as in the future, without taking any account of time.

(3) *Chronological Comparison*. This consists in tracing a juridical element through time — in a certain period or in history as a whole — by following the order of its effective realizations.

(4) *Comparison according to Comparative Evolution*. This consists in comparing the evolution of certain juridical elements in a certain number of civilizations which have not been contemporaneous, but are fictitiously considered to be so. Thus the evolution of the law of succession among the Romans, Hebrews, Mussulmen and Germans.

We do not claim that this classification is perfect or definitive. The same work may evidently be effected sometimes from one point of view, sometimes from another. But analysis based upon observation ought to be capable of distinguishing between the different types of juridical comparison, for they have not the same scope and ought to end in results of a different nature.

Thus simply for an example:

(1) Comparison according to co-existence permits of a knowledge of the particular tendencies of each people, the state of its civilization at any given time, the institutions which harmonize with one another, etc.

(2) Comparison according to nature permits of the disentanglement of the permanent and the temporary elements of law. It presents us with the greatest abundance

of juridical forms by which any particular social aim may be realized.

(3) Chronological comparison discloses, among other things, the successive influence which different civilizations may have had upon one another.

(4) Finally, through comparison according to comparative evolution, one may observe the general tendencies of juridical changes under the influence of civilization.

V: *Experience and Juridical Truths.* The diverse observations made upon the law of the past and present end in establishing the fact that inductive propositions are worth exactly what the observations from which they result are worth. If the worker has been conscientious and meticulous in his examination, if he has had access to numerous documents, his work will have authority; if he shows himself to be superficial and provided with few documents, his assertions will have no value. Can inductive juridical propositions of the four types previously stated become changed into experimental truths?

Some say "Yes," others "No." What must we think?

(1) *The Possibility of the Transformation of Inductive Juridical Propositions into Experimental Truths.* (a) It behooves us to call to memory the old argument of the partisans of the negative: Social facts, and accordingly, juridical facts, cannot be brought to pass by artificial means, consequently they cannot be the object of experiments, properly speaking.

This objection has been long since discarded. The artificial experiment has its advantages, but it is not indispensable. A great many of the natural sciences, by the simple observation of natural facts, furnish experimental truths which can be surely controlled. Thus, although we cannot produce either rain or fair weather, we can have certain indications as to some of the causes which produce rain or fair weather.

(b) On the other hand, the partisans of the affirmative who wish to establish a similarity between the experimental propositions of the social and those of the physical sciences, advance an argument equally devoid of value. They point out that in contrasting historical with present-day data, the methods of experimental exploration described by John Stuart Mill may be employed; these are those of *agreement*, of *difference*, of *concomitant variations* and of *residues*; more particularly the third of these processes, that of *concomitant variations*. This fact is incontestable. The comparative method is nothing else, and it is used in every domain of the law. Thus should one wish to know the relations between the power of the State and penal law, or between inheritance and matrimonial régimes, comparative observations or comparative experimentations must be resorted to. Here it is a question of a process of exploration, of investigation, which is to be highly recommended in every respect, but is not sufficient to give its results experimental authority. It is not sufficient that a savant may have employed a good method in order to carry conviction to the public at large. He should furnish in addition a means of testing his assertions which is within reach of everyone or at least of a great many.

(c) It is the possibility and facility of testing which give authority to experimental scientific truths. The most incredulous may become convinced by his own efforts, and the truth revealed can no longer be questioned. Hence there results a general and definitive conviction based upon facts objectively established and not upon a community which is purely subjective and variable. The sciences that have perfect experimental control register their results, and the verifications made rise to others more complex which will also be solidly established; the truth gained prepares for other truths. Slow or fast, progress is assured.

(2) *When is There Perfect Experimental Testing?*

(a) Experimental testing should be quick, easy, and within the reach of everyone, even of the ignorant. The farther the experimental test departs from this type, the more the truth which it guarantees loses its experimental quality.

(b) The test should be independent of the personality of the inventor. Thus in spite of all the precautions that it is possible to take to avoid fraud, the experiments of spiritualism are suspected because they require the presence of certain persons who are interested in deceiving the public.

(c) It should function with almost absolute certainty. The experiments which fail ought to be only those due to the awkwardness of the beginner or to the unusual circumstances. After a little practice and with proper care, failures ought to be eliminated.

In the case of the artificially produced experiment where the phenomena can be isolated, it is easy enough to obtain almost invariable success. In the case of the experiment with natural facts, one is obliged to take things just as they occur, and they do not always occur favorably. The result which might justly be expected is not produced because some unexpected fact, foreign to the matter in hand, interposes and interferes with its action. The experiment is a failure. No doubt this failure can often be explained and justified. But what has failed has failed. Foresight which has not been realized is but poor foresight. The value of the truth which has been lost in the test is not at stake; it may be incontestable. But it is no longer or only to a slight degree, experimental truth. For, as must be clearly understood, there are experimental truths of every degree and every quality. If some are beyond question, others have only a very relative authority. It is a well-recognized experimental truth at the present time that the best bouillon has no nutritive

value, and that a pound of beans is as nourishing as a pound of meat, and more so than the same quantity of bread. Absolutely conclusive tests have been made upon dogs, it seems. It is still possible for a person to confine his menu to consommé and beefsteak without shocking anyone. But when there are enough dogs and enough meat for each person to try for himself the experiment of the physiologists, their truth, which is imperfectly experimental, will become completely so, and everyone will hasten to abandon meat for beans.

(3) *How are Social and Juridical Observations to be Verified Experimentally?*

(a) If anyone, in reviewing a series of texts, discovers a principle or a truth of juridical development, he can only offer his own work as a proof of what he advances. Anyone who wishes to verify the conclusions of this labor will have to follow it step by step, investigate all the documents, and see if they have been properly interpreted and if they justify the author's thesis, so that the critic who wishes to make a thorough criticism has as much to do as the author himself.

(b) Even an examination of this kind would not be sufficient. The author has perhaps led us along the wrong road. Consciously or unconsciously, he has concealed facts which would nullify his assertions. It is necessary, therefore, to investigate not only his own documents but new ones.

(c) Finally, only very complex phenomena actually occur. Announced concordances do not come forth; expected developments do not develop, and tests will turn out wrong, even when the truths discovered are not false, but solely through the impossibility of making the experiments under the proper conditions.

As regards social science, experimental verification is very difficult. It is dependent upon specialists, and the public at large has reason to distrust them. In order to

make a serious and conscientious criticism of any fairly important historical or juridical principle set forth by an author, years of toil are necessary. These years of study which have sufficed to convert the critic himself, will not convert everybody. It very often happens that theories which have been elaborated with great pains and scientific precision never gain any standing in the scientific world because no one of recognized scholarly attainments has examined them thoroughly and conscientiously.

Therefore the social sciences are at the present time only very imperfectly experimental. Nevertheless, they are so up to a certain point. It is not easy to verify them, but it is possible. Such verification is not effected in a day, but in the course of time, of many, many years. Thus the proofs of the existence of matriarchy were accumulated in all countries and in all systems of law, long after the institution had been discovered among a certain number of peoples. A great many points in the history of law may be considered as verified by experiments.

Finally, it is to be hoped that simpler and quicker processes of experimental verification will be discovered which will be within the reach of all or nearly all. Let us look to the future which perhaps will not neglect the domain of the intellectual in the distribution of its favors. At the present time, those who erect the experimental banner in the science of history and law and expect wonderful success, have in no way changed the older methods. These old methods are good without doubt and it is by no means wise to discard them. Indeed, they are the best, if not too pretentious; they deserve quite as much confidence as mistrust.

VI: *The Experimental Method and the Law's Development.*
We have considered here the experimental method as a means of knowing the law in all its infinite aspects. Knowl-

edge of juridical elements, of relations between these elements, of institutions, of relations between institutions, and of relations between the law, institutions and outside life, — all of this knowledge may be expected to result from scientific observation which has been conducted from an abstract as well as a concrete point of view. This theoretical knowledge of the law evidently possesses great practical advantages. The lawmaker has a deep interest in knowing whether any specific institution which is proposed to him for adoption is in existence in a specific country, whether it was in existence formerly under specific circumstances, and whether it gives or has given specific results. Do we act otherwise in private life when we seek examples to direct us? The most primitive lawmakers were likewise guided by examples from the past or by those of their neighbors. The sages of ancient civilizations liked to live in ports, to chat with sailors who would describe the customs of the towns at which they had touched. This was their way of studying comparative law. In our day, there is an abundance of instruction concerning the present and the past, and it is more and more positive and accurate; but the method is the same, it is eternal.

Experience is good advice, and it is reasonable to listen to it. But it is nothing more. Correct as this principle is, it would be false to exaggerate its authority and announce: "Experience gives us scientific directions which we ought to follow."

This is true for a number of peremptory reasons of which the following are the most important:

(a) According as our methods of observation become more effective as regards the present and the past, they throw a stronger light upon the complexities and the difficulties of social problems. What is identical in a superficial observation is entirely unlike in a close examination of minutiae. Accordingly, a reform should be appraised

not only by its results in some specific country, but in its relations with the mentality, the legislation, and so on, of the country into which it is to be introduced. Even so, one could be sure of nothing, at least in the present state of science.

(b) If one could determine with certainty the effects which a given reform would produce in a given country, these might be only the principal and, at best, some of the secondary, effects. It would be a mathematical impossibility to foresee all the secondary, tertiary and further effects, and to understand their importance. A very minor and distant consequence of a reform might be so repugnant that the warmest partisans of the principal effect would recoil in horror if they could foresee it.

(c) While inventing the ideal and unrealizable hypothesis of an experimental investigation capable of making known all the effects of a given juridical disposition, we may not conclude that the obligation to accept or reject this disposition is scientifically imposed. As we have had occasion to say many times, no state of knowledge can scientifically impose an act of will. Such self-evident truths need not be formulated. But the words "experience," "experimental," "observation," have such prestige that attempts are made to place systems of legal philosophy or legislative methods under the protection of this famous method, even before we have the slightest experimental basis.

These pseudo-experimental theories are numerous, but it will be sufficient to cite two quite different types:

(1) *Search for the Fundamental Fact of all Human Society.* A great many writers seek to discover through experience and observation a fact common to all systems of society. Upon this common fact, established through observation, there will be based a general principle capable of directing the making of laws and the evaluation of institutions. Since the first observation is scientific and experimental,

they believe the evaluations which arise as consequences therefrom must also be scientific and experimental.

Here is a well-known example: "Man lives in society." This proposition may be considered as sufficiently established by experience. This first authenticated statement becomes distorted by insensible transitions into propositions which grow farther and farther from experimental truth and finally become true principles of morality, arbitrarily laid down and capable of furnishing any deduction desired; thus:

"Men live in society," "Man is a social being," "Man can develop only in social life," "The aspirations of the individual can become realized only through the existence of society," "The stronger the society, the happier the individual," "Men of the same class in society hold together," "The aim of the life of the individual is to contribute to the development of the social body," etc. A skilful theorist will multiply the transitions so that it becomes almost impossible to tell the exact moment when the jugglery takes place. From the fact that you have admitted that you take pleasure in chatting with friends over a good dinner, you will be condemned morally and socially, by virtue of the subtle substitutions of the skilled dialectician, to perform some specific "social function" which is deeply repugnant to you.

Certain theories of this kind, presented with great ability and careful consideration, constitute moral and social constructions which are quite alluring. They may have some practical utility but — as it has been remarked elsewhere long ago — they have no sort of scientific or experimental character.

(2) *Search for the Unity of Direction in Moral and Social Evolution.* Analysis compels us to distinguish between the two pseudo-experimental methods which are logically independent of one another. But they are often employed by the same author.

The one which we have just explained consists of seeking through observation "the fundamental fact of all human society," in order to deduce from it a system of ethics and of social politics. The second uses observation more constantly, if not more successfully. The examination of each institution and each principle of law and morality of the past and present is relied upon to guide the lawmaker in a safe and scientific course. For that a single hypothesis is sufficient. It is sufficient to suppose that the moral and social world is continually developing in the same direction, in a straight line, we might say. It is then easy to obtain these *directions* by a comparison of the past and the present. If one wishes to know what the family, property, penal or public law of tomorrow will be, one has only to study in what ways these institutions have been transformed in the last ten, twenty, thirty, hundred, two hundred or more years. These same transformations will become more and more accentuated. It is therefore easy for us to know what each institution, each principle of law or morality tends to become and will necessarily become. The rôle of the lawmaker is to direct these necessary transformations and to bring them about smoothly, hastening or retarding them according to circumstances.

This thesis may be presented under a very scientific form by appealing to the "laws of evolution," "the formulas of change and transformation," or to "the orientation of man and society toward a given state." But the most ordinary logic uses absolutely identical reasoning without resorting to any philosophic formula. Nothing is more commonplace than to judge tomorrow by today. It is a mental vice of which it is very difficult to correct oneself. If it is fair weather today, it seems to us that it will always be fair; if some enterprise prospers, it can only keep on prospering; a price is advancing, one snatches at a chance to buy. How we are deceived the first day of

the drop! This drop is certainly going to continue steadily, and a panic takes possession of the community. There is a good sale for wine, everybody plants grapevines; there is a dullness in the market, they are neglected. In all the circumstances of our existence, we see tomorrow under the aspect of a today enlarged in every way, and we are often, very often deceived.

Towards the end of the nineteenth century, some serious-minded political economists (not to mention Robida) affirmed that the rate of interest was continually and constantly falling. In 1920, it ought to be one-half per cent, at the most. The social problem was solved by this fact. Since no one could live upon acquired fortune, everyone would be compelled to go to work. By the force of circumstances, "labor and virtue" was to become the motto of the twentieth century. Here, as everywhere, "the moral law was virtually contained in the scientific law."

This theory of moral and social evolution through the employment of the experimental and inductive method was and is still perhaps the accepted theory in secondary instruction. In colleges it is held to be as true as the Gospel. It has the advantage of creating a cheap system of ethics which is apparently scientific and inclined to have great weight with rather unreflecting youth. We shall not discuss its merits as a process of civic education. From the scientific point of view it is scarcely necessary to say that this method has nothing in it of the experimental except the name. That the present and the past can give *direction* to the future, morally or socially, this is what history contradicts as flatly as possible. In any case, a test would have to be made, and the boldest cannot affirm that it has been made.

It is also to be regretted that a number of serious works which have perforce cost great effort have considered it obligatory to take as their basis a philosophic

theory so completely untenable. They lose thereby a great part of their value.

Here is, for example, a young lawyer who is very conscientious and zealous in his devotion to science. He wishes to know the future of private property, and, up to a certain point, how legitimate and useful it is. With this in view, he has recourse to historical observation. He believes that by a rather superficial examination he will establish the fact that from the beginning of feudalism down to the present time and particularly during the last hundred years, the rights of property owners have become more and more impeded. What value has the establishment of this fact for foresight into the future, for appraisal of the utility or understanding of the construction of our institution? None of any kind. Changes there will be no doubt; but no one knows in what direction; and if the long labor has no other aim than to settle us on this point, it is totally useless.

Let us end by stating that in all times, good and bad observations have been possible; and that we may well look to the future for well-conducted experiments and observations. In the meantime, let us seriously mistrust pseudo-experimental sciences.

§ 3. *Juridical Categories.* We shall call categorical truths those which are capable of being understood apart from every experiment, through intellectual effort alone. Above the physical world, they exist prior to knowledge, and without them no knowledge would be possible. Although they are forms of thought, they are independent of our cerebral constitution and of our psychology. We arrive at a knowledge of categorical truths, we do not create them. They are determined before we determine them. There is nothing in them of the subjective, and although devoid of corporeal or physical reality, they possess an abstract reality which may force itself upon logic as well as upon experience.

That such truths exist cannot be doubted. All mathematical truths are of this nature; inductive as well as deductive logic possesses likewise the same characteristics. Is the expression "categorical truth" satisfactory? The categories of Aristotle and especially those of Kant — quantity, quality, relation, modality — possess the characteristic of being forms of knowledge which are prior to all knowledge, which existed before men understood them and which would exist therefore if men did not understand them. Through an extension of this terminology, but without binding ourselves to any system, we shall apply the term "categorical" to every truth which presents these characteristics. At the same time we fully recognize that if this same word has been used in a like sense in other works, it has been equally used in very different senses.

It is of prime importance from a philosophical and logical point of view to consider whether categorical elements exist or do not exist in any given discipline. In so far as this examination has not been made, it is scarcely allowable to pretend to understand the nature of this discipline. Now it is not only abstract sciences which contain categorical truths. Certain branches of human knowledge which affect mankind and deal with certain elements of human civilization are instances of this. The science of language may be cited as a notable example. Every language has been formed under the influence of extremely varied causes, and to apprehend some of these it is necessary to follow the course of history. Every vocabulary, whatsoever, is purely arbitrary, or, if it is preferred, conventional, in this sense, that there is no rational connection between an idea or an object and any sound or sign whatever, and that every sound is equally qualified to represent every object. Therefore the choice which has joined a name to the thing which it represents is a simple one due to varied circumstances, but it is an

arbitrary one. The French word "chapeau" represents the object which is worn upon the head as legitimately as the English word "hat." In this respect all languages are upon the same footing. It is not the same with rules of grammar. These depend upon usage no doubt but follow more or less closely an abstract type, a form of pure grammar which represents the logical functions of the language. These logical functions of language, man discovers little by little through reflection; every dialect conforms to them to a certain extent and neglects them to a certain extent. But we cannot deny them an existence that is independent of human psychology.

If one wishes to reply in the affirmative to the question "Have you the hat?" the indefinite number of signs may be employed: a nod of the head, the monosyllable "Yes"; an Englishman would say "I have," a Frenchman "Je l'ai." But none of those who formulate these different responses answers in an entirely logical fashion. In order to understand their thought, the interrogator will have to complete the work and establish the form, "I have the hat." The pronoun subject, the verb, the definite article and the direct object complement are so many categorical elements which may be unrecognized by the human mind and ignored by practical grammars, but which are none the less necessary to the expression of the logical thought.

In this sense, of two expressions which fulfill identically the same purpose socially — communication of a thought with all its shades of meaning from one mind to another — we can say that one is more correct than the other if it is more in conformity with its logical function. Thus La Fontaine entitles one of his fables "Le Lièvre et la Tortue," and we understand even without reflection that this title is exactly equivalent to that of the Arab fable-writer Loqman, "Sulahfatun wa Arnabun," a Hare and a Tortoise. But it will be agreed that this last form is more correct, for at the time when the title of the fable is an-

nounced, the hare and the tortoise in question are by no means determined as far as we are concerned.

Just as the logical and categorical functions of language are independent of its social functions, so that the grammars of very different dialects present them only in a mutilated and fragmentary form, so do the logical and categorical functions of law appear in the various civilizations in a form that is mutilated, fragmentary and independent of its social functions. A comparison between these two disciplines seems to me the best means of throwing into relief the idea of the categorical in law. For law, like language, is composed of purely conventional elements and of logical elements. These logical elements, the practical lawyer in different countries may or may not understand. But just as the perfect sense of a phrase may be rendered only by pure grammar, so the perfect sense of a juridical precept may be established only by conforming to the categorical principles of the law.

But the science of law is more complex than that of language, and this is why the latter is particularly well suited in many respects to explain the former. Juridical science is composed of multiple elements of which one may disengage the following, though the list is not complete: social aims (institutions), artificial technique (construction), pure logic (categories), and metaphysics (legal philosophy or the idea of right). These modes of thought relating to the law are of such a different nature that their mingling and confusion in a discussion or in the exposition of a system renders the whole absolutely incomprehensible. That is why it is so difficult to define the scope and meaning of so many works on juridical theory and dogmatics.

During years and years of reading of works on abstract law in which it was certainly permissible to hope to find some true legal philosophy, I have felt myself bandied about between admiring belief and the most complete

scepticism. Some particular idea, assertion or discussion would appear to me most sound and of enduring interest, some other idea, assertion or discussion presented in the same work under the same form and with just as much insistence, nothing more than empty verbiage. I often asked myself whether the evident vacuity of certain passages ought to draw in its train the condemnation *en masse* of the whole, or if the evident interest of certain other passages ought to entail a general adherence which it seemed to me difficult to accord.

These were only personal impressions. I am now convinced that a great wealth of ingenuity and subtlety may be expended without advancing by a single step the knowledge of the nature of law, if one persists in mixing up and treating by the same processes ideas that logically have nothing in common. Among the distinctions which it is well to make, that of the juridically categorical is one of the most delicate and important. Moreover, it must be recognized that if this distinction is not yet classic, numerous thinkers have labored to disengage it without perhaps having yet made it sufficiently obvious.

I: *Categorical Ideas in Juridical Literature*. A certain length of time is necessary to the human mind before it can understand how it should approach the various problems of knowledge. Very often, it makes the mistake of trying to decide by reflection or discussion questions upon which observation and experience alone can teach it. Less often, but often also, it asks of experience what experience cannot give or can give only with difficulty.

Likewise one sometimes sees the different disciplines change their methods. Very often after arguing at random upon problems insoluble by reason, one perceives that it is of much more value to consult positive facts, and the experimental method is substituted for the *a priori*. The reverse case, the substitution of the *a priori* for the experimental method, is more unusual, though it

may occur also. Mathematics may be cited as an instance of the latter; also the study of juridical categories, which though still confused has nevertheless been pursued for a certain length of time under various names.

It is very probable if not certain, that the mathematical sciences have resulted from experience, a fact which nevertheless does not change their nature. Even in our day, many people who are not very well-grounded in its principles, solve problems by measuring a figure or by trying in turn a certain number of solutions to see if they are correct. Such groping is nothing but experimenting. Mathematicians say that a purely experimental system of geometry is imaginable. In it the relations between the hypotenuse of a right-angled triangle and its other sides would be established by carefully measuring the sides of a great number of right-angled and non-right-angled triangles. A very correct calculation might be possible by considering mathematical truths as simple probabilities based upon induction. But for a long time they have been known to be necessary and objective truths.

Juridical categories have had another difficulty in extricating themselves from the experimental method. Have they in fact succeeded in doing so? If there exists any mathematics of law, it would remain unnoticed a long time, for a number of reasons. It is one of the most secret and modest elements of juridical science. Its direct practical interest is nil; and if it is of a nature to interest, from the higher point of view of true philosophy, those who like to delve into the enigmas of abstract thought and pure logic, it is devoid of interest for the practitioner, the politician or the moralist. Not one of these persons dreams of propounding to himself this question: What is the *logical* nature of the human thoughts whose synthesis constitutes the law? Philosophers and theologians claim the right to judge between institutions, to furnish a criterion by which to separate the good and the bad. Jurid-

ical philosophy has remained for a long time a justification or a criticism of institutions, either the present or the past, or those hoped for or dreaded in the future. Positive and natural law march side by side.

In the eighteenth century the best minds were hoping that a system of legal metaphysics might be established which would be as certain as that of mathematics. "To assert that *Law (Droit)* did not exist before *laws (lois, enacted laws)*," said Montesquieu, "is to claim that before a circle had ever been drawn all the radii were not equal."¹ This remark, which would have been quite true applied to abstract juridical form, was evidently false when applied to the substance or content.

However, there have been in every age certain minds which have had a more positive tendency, — the tendency to dispense with natural, desirable or divine law as something pertaining to religion, dealing with what ought to be and not with what is; and to seek in observation juridical realities and general ideas that are capable of making the true nature of law understood. Austin gives credit to Hobbes for having laid the foundation of a system of philosophy of positive law, credit which is perhaps not entirely deserved. Did not the philosopher of the seventeenth century wish for exactly that thing to be done which was done by the jurist of the nineteenth century? This is not absolutely certain, but the kinship between the two minds is undeniable.

(1) Austin's "Lectures on Jurisprudence or the Philosophy of Law," published in 1830, constitute a first and solid analysis of abstract legal science. Before entering upon his teaching, the celebrated English professor had gone, in full intellectual maturity, to put himself in touch with German science. He preserves none the less an entirely English precision of thought which connects him with the philosophers of his own country. Thus in 1819,

. 1 "L'Esprit des lois," bk. I, ch. I.

Hugo had published a "*Lehrbuch des Naturrechts*," which he presented as a philosophy of positive Law, "*als einer Philosophie des positiven Rechts*." While he appreciates this work thoroughly, Austin nevertheless affirms that it constantly confuses positive and desirable law, and that an absolute distinction between the two ideas is the first rule which he imposes upon himself and intends to follow faithfully.

In fact, the principal aim of his work and its chief claim to originality is to rid the exposition of positive law of every element of criticism and every judgment of value. He wishes to make the law known just as it is, whether good or bad, and not what the law would be if it were good: "Law as it must be, be it good or bad, rather than law as it must be, if it be good."

On the other hand, he tries to study positive law in general, and not one, two, or more systems of positive law in particular. The general nature of his statements gives them a philosophic character and they remain positive statements purged of all arbitrary evaluation. As for natural law, which he prefers to call divine law, Austin does not contest its value. It is well to study it in its own time and place and by its own methods. In order to avoid any confusion, he divides the whole of juridical science into three distinct disciplines:

(a) Study of the law as it ought to be to be right; natural, desirable or divine law.

(b) Study of particular positive laws as they perform or have performed their functions in every legal system.

(c) Study of positive law in general, general jurisprudence, or philosophy of positive law. It is to this last branch that he devotes his efforts.

However praiseworthy this first effort at analysis may be, it does not suffice to give us an understanding of the true scope of Austin's work. Upon what logical basis is it established? Is it a work of observation, or does it

follow the *a priori* method? In drawing a general picture of law in all countries and at all times, has the scholarly Englishman performed the work of an observer? Did he begin by gathering together the maximum amount of information upon every civilization accessible to him? Did he disentangle the constant from the accidental? Are the abstract juridical elements which he presents to us only generalizations of concrete facts, the representation of real life according to some particular scheme? Either belief or doubt on these questions is permissible.

Belief, because at first sight, observation seems the normal and indeed the sole course in a study of positive law. Just as observation alone can inform us concerning the concrete content of a particular positive law, so does a recourse to observation seem indispensable in establishing a general Law which must conform to all particular Laws. Moreover, since the author does not indicate that there are other logical means of discovering the truth, one is forced to the conclusion that none are known to him.

On the other hand, Austin affirms that he depicts not only the law as it is, but "*as it necessarily is*," — "law as it must be." Therefore certain elements of the law impose themselves, cannot be other than they are. The assertion of such an important fact demands explanations which it seems to me the author avoids. What is the nature of this *necessity* by virtue of which certain legal principles impose themselves? How is it to be attained? How is it to be proved? Is it observation that has revealed it? Is it logic? Austin is not definitely settled upon this important point of the science which he expounds.

In reality, the author does not render a very strict account to himself of his method. He had studied very conscientiously a certain number of legal systems and it is in them that he discovered the point of departure for his

generalizations. His documentation was, however, a trifling basis for his affirmation of any juridical *necessity* whatever by virtue of his experience alone. An unexpressed and perhaps unconscious logical operation gives him a presentiment of a truth beyond that of observation, the categorical truth upon which rests the first element of the law.

We have taken Austin as an example because of the value of his work and the accuracy of his thought. But the legal philosophers in whose systems observation and logic "a priori" are in more or less happy accord, without one's knowing exactly what to rely upon, are not lacking at any period.

(2) Roguin's "Règle de Droit." In this progress from the inductive towards the "a priori," let us make a great step forward and take as a type the subtle work of Professor Roguin, "Règle de Droit." Among the numerous volumes which treat of juridical dogmatics, this one is particularly valuable from our point of view.

Roguin's "Règle de Droit" has already run a course of twenty-eight years. Welcomed from its publication with particular interest in France and other Latin countries, its direct and indirect influence has been quite considerable. In many quarters it has given an entirely new mental direction. It does not pertain to us to point out its various merits nor even to discuss or evaluate as a whole the conceptions which it contains. We are not fashioning here either juridical theory or dogmatics. We desire simply to state accurately the nature of the thoughts or the affirmations contained in particular works, in their relation to general logic.

Now the introduction of the "Règle de Droit" throws this last question into sharp relief. It is devoted to the *classification of disciplines*, and to the nature of *pure juridical science*. This little treatise has for its precise object the solving of the problem with which we are occupied,

and a résumé of this kind, intended to connect juridical logic with a system of general logic, is a rarity greatly to be appreciated.

Since the appearance of this work, the eminent jurist has been devoting his attention to the lofty questions of pure law. Upon the abstract questions of law, his ideas have, to be sure, developed along lines which we cannot study here, as the volume "Questions générales," announced by the author, has not yet appeared. It is not, therefore, the ideas of the author, but the ideas of the work which we shall examine. They are interesting to us in themselves, since they would no longer correspond exactly to his thought today.

In Roguin's "Règle de Droit" there is nothing of Austin's ambiguity. In it, pure juridical science is frankly given as "a priori" science. There observation plays the entirely secondary part of a stimulant, of something that evokes effort. No doubt the knowledge of the practical legislative dispositions of a certain country is useful in the discovery of pure law; indeed such a discovery is only made then through the juxtaposition of a certain number of laws. But it is logic alone which can decide when a specific proposition is necessary and when it will perforce be discovered in every possible and imaginable legal system. Whatever the jurist, as such, derives from observation might just as well be derived from his imagination or his fancy. Several comparisons between pure law and mathematics give us the impression that from the author's point of view the truths of pure law are very much of the nature of those we call *categorical truths*.

However, this is not absolutely certain. Roguin follows the original, ingenious and subtle system of logic developed by the philosopher Naville under the title, "De la classification des Sciences." Pure science is there called *theorematics*. It should be pursued under the form of

theorems, and should have for its object "to seek the consequences contained by implication in the premises which it states." This *theorematics* seems — at least, to me — to be of a rather ambiguous character. It somewhat resembles simple deduction, where a formula is stated in order to get out of it what has already been put into it. No doubt, this process may also serve to reveal categorical truths, provided there are any to be discovered. One may thus establish by deductions the relation between the hypotenuse and the other sides of a right-angled triangle, because the relations of geometric figures exist categorically. But if the law has only a conventional existence, all the definitions which we give it will be conventional. From such definitions we shall necessarily be able to draw out what we have put in, but nothing more. Thus *theorematics* may quite as well cover a truly scientific work as one simply tautological. Moreover, in order to disengage the necessary elements of law, Roguin seems to me, in the course of his work, to proceed neither by deduction nor theorem, but by the path of evidence. Now the axiom, or the self-evident statement, is the basis of all elementary categorical truths, as we shall have occasion to show, so that in spite of the author's precision of thought, there exists in the "Règle de Droit" a certain obscurity in regard to the relations between pure law and the principles of logical knowledge.

(3) *Recent Works on Juridical Categories.* In a number of very recent works, only a few of which we shall attempt to mention, we shall find the idea of "juridical category" more fully emphasized and the word itself employed sometimes in almost the same sense that we give it here. In the front rank we place that of A. Reinach: "Die apriorischen Grundlagen des bürgerlichen Rechtes" which has found a solid basis in Husserl's philosophy. It is, in fact, this philosophy which has, it seems to me, best solved the problem of knowledge, that is to say, the rela-

tionship between experience and the *a priori*. One may also consider as very important for the elaboration of this special point of juridical science, Djuvara's thesis, "Des Fondements du Phénomène juridique. Quelques réflexions sur les principes-logiques de la connaissance juridique."

These two authors state very clearly the same principles of categorical law, likewise its logical value and its relations with knowledge in general. But when it is a question of applying the theory to practice and of disengaging the form from the substance, questions of construction and especially those of metaphysics become confused with questions of pure logic. There is a great temptation to introduce among these categories which are pure forms of pure functions of the abstract intelligence, some vague moral or social attribute, a microbe-like germ of judgment of value which wisely developed would hatch out a full system of positive rules of conduct. The juridical vocabulary lends itself to this particularly well: thus the word "obligation" may be employed in formal logic to denote a particular juridical situation without involving the idea of any social or moral duty whatsoever. But if it is said that the "obligated person" *ought* to fulfill certain oaths, *would do well* to fulfill them, *commits a fault* if he does not fulfill them, here the wolf is let into the sheepfold and pure science will be devoured entirely by natural law. In the same way, the word "person" in pure logic denotes an abstract being capable of performing a certain abstract part. This being is devoid of any physical, psychological or moral attribute. If we attribute to it any quality whatsoever, if we make of it a human being, free, reasonable and capable of exercising its own will, we go completely beyond the fact of categorical science, in order to yield ourselves to purely arbitrary constructions.

Now Djuvara puts "obligation," that is, the mandate of moral duty as an idea *a priori*, and the idea of liberty

as a condition of law. Reinach makes the idea of obligation spring from the promise. Thus, from my point of view, they erect metaphysical or constructive edifices upon categorical foundations.

This is almost what Binder charges Stammler with, in an extremely lucid article. The ideas which he develops in this article and in his book, "*Rechtsbegriff und Rechts-idee*," seem to me to approach very near the culminating point of pure juridical logic. Nevertheless, his extremely perspicacious method and his fidelity to the doctrines of Kant lead him to deny, or to appear to deny, the science which he has succeeded with so much difficulty in separating from nearly all foreign elements.

The categorical idea of law is a pure function of the abstract logical intelligence. It is devoid of any concrete, physical, psychological, moral or metaphysical element. But it is very rich in formal content and is susceptible of infinite development. The category "quantity" is equally devoid of all concrete content; but it contains in itself "unity," "plurality" and "totality." Unity in its turn comprises all the fractional divisions which compose it. Plurality comprises duality, trinity, and so on. In the same way, the categorical idea of law comprises juridical fact, the object of law, the injunction, the sanction, and so on. Each of these notions has a formal content susceptible of being analyzed "*ad infinitum*."

Through its delicacy and its abstract character, the nature of pure logic is one of the questions upon which it is most difficult not only to be agreed upon but to be understood. If two persons have not followed the same road toward the same abstractions, they may speak the same language while at the very antipodes of thought, and different languages while very near together. One might try the following means of testing, which seems to me quite convincing. Before entering upon a discussion on a point of logic, propound this question to one's

antagonist: "Would pure juridical logic exist on the same basis if humanity did not exist?" Some will answer: "If humanity did not exist, there would be no Law and accordingly no juridical logic." Those who make this reply have not a ripe enough or an abstract enough mind to understand the nature of the categorical in law or elsewhere. Those who respond in the affirmative have already understood it.

II: *Juridical Categories and the Problem of Knowledge.*

(1) *Nature of logic.* As a matter of fact, that which characterizes every logical science is the authority by virtue of which it dominates the mental activity of man, as well as the manners and institutions of human collectivities. Logic is the agreement between truth and human thought. It is accordingly above and beyond this thought and cannot be absorbed into it without losing its entire value and even its whole existence. If the ideas of identity, causality, etc., and all the mathematical sciences were not the cerebral translation of principles which are independent of our brain, they would be totally devoid of objective force and usefulness. Anything that can be traced back entirely to human functions (whether physiological, intellectual, sentimental or social) no longer has in it any element of logic. A system of abstract law which would exist only through man and for man would have to be classed among variable, relative and descriptive disciplines and not among those which are invariable and normative.

The conflict between logicians and psychologists, between those who try to trace all psychology to logic and those who take the reverse course, cannot detain us here, but if it is allowable to make any distinction whatever between wisdom and folly, the domain of the two sciences is easy to define accurately.

Psychology is nothing more than the description of mental activity taken at any particular moment. Logic

is the criticism of this mental activity, the fact of recognizing that certain acts of the mind are in accordance with external reality and certain others are not.

A mind that is thinking is a boiling cauldron. The most fantastic ideas may be intermingled with the most commonplace without any apparent order or reason; and this is quite as true of a mind which is working as of one which is wandering. In this sense, there is no method of work. Thoughts do not place themselves under the yoke of logic for the purpose of ploughing a straight furrow. Ideas come to the worker urged *from* within, and many mathematicians have often recounted that the solution of a problem sought arduously but vainly while waking, came to them entirely of itself during sleep.

The description of this mental creation pertains to psychology; but the evaluation of the various thoughts which cross the mind is performed by objective rules, which constitute logic. All men think in about the same fashion, and the photographs of an instant of the intellectual life of a fool, a dreamer and a scholar — if it were possible to take them — would be perhaps completely indistinguishable from one another. But there are minds which criticize their first evaluations, others which criticize their first criticism, others still, this second criticism, and so on. At each of these stages of logical labor, thought becomes more methodical, more abstract. The product of its labor takes a form that is more subtle, and less concrete, less accessible to the public, but also more objective and more general.

Logic which is based upon objective rules superior to the human intelligence is clearly distinct from psychology, which consists entirely of the description of what takes place in the human mind. Thus the rules of positive law are made by man and for man and become partly absorbed in human psychology; juridical categories, if they exist, are of the same nature as rules of logic, and that

which constitutes their value is independent of the structure of the human brain.

(2) *Nature of Evidence.* This objective value of logic is as certain as a proposition may be certain, but, let it be understood, no more so.

What is the absolute value of human thought? The problem is inapproachable, through the fact that this absoluteness with which our thought would have to be compared is totally inaccessible. What is the value *to us* of our own thought? This is the sole problem which can be propounded upon the nature of knowledge.

It is very certain that man can reason only with his brain; that all of his logic and his experience is dominated by a tremendous doubt, that of its own value. All certainty is floating in an infinite obscurity which one must not dream at all of dissipating. From the absolute point of view, every human affirmation is purely conditional and implies a certain degree of brain power in him who affirms or reflects. It is thus with the simplest and the most material observation as well as with the most complex calculation. But among human beliefs based upon physical observation as well as upon logical calculation, there are those that are acquired only through more or less protracted labor, in the course of which haste, distraction, or insufficiency of documentation may produce mistakes. If these beliefs are false, the brain which affirms them is not for that reason convicted of any lack of power. There are, on the contrary, statements of physical facts and elementary logical affirmations which if false would completely invalidate the brain power of the one from whom they emanated. These are self-evident truths.

One may then call an axiom or self-evident proposition that whose falsity would lower to zero the intellectual force of the person who formulated it. Thus it is very commonly said, "If what I say is not true, I am a fool."

In this way evidence is relative to each individual and is not demonstrated. Those who have not the same points of evidence upon a given subject cannot discuss together, and if such a discussion is possible, it is because there are collective evidences common to more or less numerous groups. The scientific development of the mind always has the effect of modifying the classes of "evidences." What is evident to a rudimentary mind is not at all so for the cultivated mind. Besides, the latter has gained through its labor some certainties which were formerly unknown to it.

Evidence may result from observation and deduction. It may also be categorical. Categorical evidence lays down the primary ideas without which all thought would be impossible; quantity, quality, relation, and modality. It also establishes primary relations between primary forms; and in this instance it is termed an axiom, e.g., the principles of identity, of causality, etc. It is only through evidence that we can distinguish between experimental, deductive and categorical truths. A system of logic might be imagined in which mathematical truths would appear as subjective, accidental truths and truths of simple observation. But since this logic would no longer have the same points of evidence as our own logic, all discussion between the partisans of one or the other would be useless, as each would consider in advance that the intellectual worth of his adversary was reduced to zero.

III: *The First Elements of Law.* Man already had behind him a very old philosophical and a very old juridical past when for the first time this primordial question was propounded: "What is law from the philosophical point of view and what are its elements?" For primitive civilizations and practitioners in all civilizations care little about abstractions and still less about the philosophical nature of these abstractions. Besides, as it very often happens,

the primordial question has been propounded last. The philosophy of law possessed a rather rich fund of diverse ideas — a confused mixture of beliefs, reflections and experiences — long before anyone thought seriously of justifying the primary idea of the law and of disengaging its elements.

The history of the development of juridical thought, the processes by which it has grown little by little into self-consciousness, is of great interest; but this interest, purely historical, cannot be of any use in determining how the idea of the law, having once attained the limit of its development, can be justified as an independent idea, or in what class of philosophical truths it may be ranged.

The idea of law may be apprehended under but three logical forms: the idea of observation, the idea of convention, and the categorical idea.

(1) *Observation as the Basis of Delimitation of Juridical Ideas.* Can observation fix the limits of the idea of law and distinguish it from every other adjacent idea?

There are concrete phenomena of social life which we term juridical, and there are others to which we do not apply this qualification. If it is legitimate to make the abstract spring from the concrete, the law would then be the specific difference between these two groups of social facts, one juridical, the other non-juridical. The characteristics of constancy which would always be established by observation to exist in the first group and never in the second group, would form the essence of the law, a very definite essence and one established upon the basis of solid observation.

All this, however, is pure illusion, pure tautology. Our first classification into "juridical" and "non-juridical" facts, borrowed from everyday language, is devoid of all scientific value. In these two groups born of the chance development of terminology, the common and the differentiating traits may be purely accidental and incidental.

To obtain an experimental idea of the law, it would be necessary to start from a fact of experience, and we can start only with the customary language. It is a question of drawing inferences from positive data and we can only graft observations upon words. We have distinguished social facts as juridical and non-juridical; but this distinction is purely verbal. Rationally, in order to distinguish what facts are juridical, it is necessary to know first what law is. And the experimental definition of law can result only from the analytic observation of juridical facts. It is impossible to escape from this vicious circle. An experimental definition of the law is radically impossible.

(2) *Conventional Formulas as the Basis of Delimitation of Juridical Ideas.* But it is evidently possible to give a conventional definition of the law. In logic also agreements form laws between the contending parties. Two or more dialecticians may decide among themselves to choose certain social facts which they will consider as juridical to the exclusion of others. They may quite as well agree to term juridical those facts which present one or more essential characteristics. They might thus formulate rules of this kind: "Every juridical fact is accompanied by command and eventually by sanction on the part of the public authorities."

What would formulas of this kind drawn up by agreement be worth from a logical point of view? They signify an accord of thought between a few dialecticians, at a given time. But this accord is often more apparent than real, for often the partisans of one side concede a formula because they do not see all of its consequences, while those of the other side, more clear-sighted, propose the formula because it is a good means of forcing their opponents to accept at the end of the discussion what they energetically rejected at the beginning.

Here we find the tricks of the rhetoricians. They are

quite worthy of esteem, and the divine Plato did not disdain them. Often, by abusing conventional definitions, he obliged his opponents to acknowledge themselves defeated. But in pure logic, one is never bound by its conventions, and he who sees an unforeseen consequence arising from them can always disentangle himself. Having adhered to a definition all of whose consequences he did not understand, he recognizes his opponent's perspicacity. But by avowing that he did not understand the full scope of what he was led to say, he may retrace his steps and the definition falls to pieces because it was based solely upon his consent and this consent was based on error.

Therefore, any work built upon a conventional basis always remains purely conventional. It can never change its nature and the least contradiction is sufficient to reduce it to nothingness. Studies of pure law established upon this basis would be almost devoid of interest.

(3) *Specificity of the Law as a Self-evident Idea.* Through elimination, the solution is forced upon us. The specificity of the law is a categorical truth, or it is nothing at all; and in the meaning in which I use it, it is categorical in the same way that quality and quantity are, although more restricted in scope. It plays the same part in society that the verb or the adjective does in language. It is a form necessary to the understanding of all society, but independent of any concrete association, just as the idea of the verb is independent of any concrete language.

For the human mind, it is a self-evident idea. One may admit or not admit the specific quality of the law; but if it is admitted, no other philosophical form can be given to it except that of a categorical, self-evident truth. And between him who admits it and him who rejects it, no discussion upon the abstract nature of law is possible.

IV: *Delimitation of Juridical Categories.* In speaking of the lawmakers of ancient civilizations, assertions of this nature are frequently made: "They confused law and

morality," or "They did not know how to distinguish between law and morality." If these phrases have any meaning, they summarize all that we have said in the preceding paragraph, for they indicate an inferiority in the logic of those ancient lawmakers, just as they might have been reproached for not knowing how to distinguish a verb from a substantive or how to count up to a hundred. If the specificity of the law were purely a matter of convention, since all conventions are equal from the logical point of view, the ancient conceptions could not be inferior in any degree to modern conceptions.

The specificity of the law is therefore the first categorical truth. This specificity is assured by a certain number of axioms which fix the essential elements of every juridical relation, object of law, command, active or passive subjects, etc. The distinction between juridical functions — political, legislative, judiciary or doctrinal; the distinction between private law, public law, criminal law, etc., the distinction between real rights and personal rights — all of these form just so many branches of the categorical syntax of the law.

We throw out these few suggestions regardless of method and simply by way of example. It is the part of the legal logician to present them in a well-ordered system, and we know that if this task is not yet accomplished there are respectable jurists who have already undertaken it. Let us take a proposition that is rather complex and evidently not to be grasped easily without commentary, which was established by one of the disciples of Professor Roguin: "Every relation of law is susceptible of producing a new one, that one, a third, and so on until the sovereign power is reached. The non-realization of the performance (object) of the primary relation becomes the 'fact submitted to the law' of a secondary relation whose performance is the sanction of the primary relation."¹

¹RÔGER Secrétan, "Thèses accessoires" (1917).

Without pronouncing an opinion upon the substance of this thesis, it is in its form a proposition of pure juridical logic, that is, according to my idea, a proposition of a categorical nature.

Our sole intention is to establish the existence in the law of a certain group of thoughts of an entirely special logical nature. But in works on juridical dogmatics, these elements of pure logic are constantly confused with considerations which are simply metaphysical or constructive. How are they to be distinguished?

(a) The categorical is a pure logical form; it cannot contain any judgment of values. It can furnish at neither short nor long range any line of conduct or element of evaluation. The ideas of justice, moral obligation, duty and subjective right remain entirely foreign to it and arise from metaphysics.

(b) The categorical cannot depend upon any conventional or traditional conception. Are real rights categorically different from personal rights? To solve this question, historical precedents should be avoided, just as it is totally useless to study the language of negroes or of primitive tribes to determine whether the verb is logically different from the substantive. Many civilizations have not distinguished law from morality, public law from private law, nor criminal law from civil law, but this fact in nowise affects the logical value of these distinctions.

(c) Finally, since the categorical is the abstract form of juridical thought, it can no more contain a concrete psychological than a concrete physical element. In abstract juridical logic, a milestone may be an owner; a log, a king; and a horse, a consul of Rome. No individual quality is required to act any part, since it is a question of general abstractions, where any intervention of the accidental would result in irretrievable degradation. In abstract juridical logic, Robinson Crusoe is owner of his island by right of occupation, even though this title is

totally useless to him since no one can recognize nor contest this right. And if the moon is inhabited, the people there are as much obliged to respect my ownership as are my most immediate neighbors, since pure logic is not concerned with questions of transportation either upon earth or across the sky. Thus institutions which are only concrete habits of humanity are not in themselves explicable by categorical logic.

V: *Rôle of the Categorical in Juridical Life.* The juridical categorical cannot furnish any directions for the creation or interpretation of concrete positive law. And, furthermore, it is equally impossible for it to serve as a basis for any juridical technic whatever. The form of positive law, like its substance, remains always a question of practical expediency. Just so the study of abstract syntax can furnish no practical rules of language. Without doubt, the most scholarly languages are those which are richest in their expression of abstract ideas. These are the languages of philosophy and meditation. But practical life has quickly impoverished their work. Delicate forms and shades of meaning are easily neglected and disappear from the spoken language and even from works of literature. What a gulf between the grammatical treasures of Sanscrit and literary Arabic and any living language of the present day! Can it be said that a language with a rich grammar is superior to one whose grammar is meagre? The two correspond to different needs. Very advanced civilizations employ a telegraphic language which resembles the language of very primitive peoples. They use "nigger talk." They lack the time to employ scholarly forms and those studied by grammarians. The work of the grammarian is nevertheless not lost. The simplest syntax of the ultra-civilized implies the complex syntax of the scholar, so that the resemblance between the language of a modern and a primitive man may be more apparent than real. It is useless to employ in

speaking certain disused forms of the subjunctive, but anyone who is ignorant of them is in a state of intellectual inferiority.

It is identically the same with juridical syntax. A positive law cannot be said to be of a higher order from the fact that it reproduces the forms of this juridical syntax. It is possible, on the contrary, that a law in a rudimentary form is of more service than a scholarly law. Many systems of legislation have confused public, private and criminal law and been none the worse for it. The fact that real rights are categorically distinct from personal rights does not compel their separation in the framing or even in the teaching of positive law. But the rudimentary law of the practitioner implies the categorical law, the juridical grammar, which alone can give the complete logical sense of the law.

Historically, the existence of categorical truths tends to unify and regulate the progress of the law. While constructions may be as varied as human psychology, pure logic is the same for all and in all systems of legislation. The variety may spring from the inequality of science, but the object of science is identical. No doubt, certain jurists and systems of legislation dive deeply into the abstract truths of laws, while others scarcely scratch the surface; the same aspects of these truths are not always revealed to both.

§ 4. *Pure Legal Science or the Science of Possible Solutions.* In Roguin's Preface (beyond which I hardly follow him) he points out a scientific germ that is very slightly developed, but quite interesting from the logical and perhaps also from the practical point of view. Let us give it the name of "pure legal science" or the science of possible solutions.

This legal science may have serious practical interest as an auxiliary of politics. The politician who appraises existing laws, proposes reforms, or invents institutions,

cannot — let us repeat — perform scientific work. Among all the solutions which are presented to him, he is obliged to make a choice, to express a purely subjective and hence arbitrary judgment of values. There are therefore no political or legislative problems, if we use the word “problem” in its exact meaning. “Must divorce be established, facilitated or restricted?” “The death penalty abolished or maintained?” “Inheritance rights granted to some specific relative?” These are questions to which an answer may be sought, but not problems that could be solved; for a problem implies the possibility of discovering through scientific processes a certain, although a hidden, truth.

But the politician, who is not engaged in scientific work, may, nevertheless, consult other sciences in order to gain convictions or discover new solutions. He has scarcely resorted up to the present to any but concrete sciences and observation, to history and comparative law. If he wishes to make a critical examination of a special institution or social organization, he consults the past, and studies foreign legal systems, that is, he observes what has been done in former times, and what is being done in our day. But what has been done formerly and what is being done nearly everywhere now may be a very small thing in comparison with what might be done. And what might be done can be indicated only by an “*a priori*” logical science.

Roguin puts these questions:

“(Must we) hand over all efforts at innovations to the ordinary or official lawmaker who nearly always steps in accidentally and without method?

“(Would it not be more fitting) rather that jurists endowed with mentality capable of analysis and synthesis should interest themselves in the establishment in each legal province of a vast system of *possible* juridical relations without regard to their actual existence or non-

existence? We believe that it would be extremely wise to follow this course, in order to offer to the lawmaker a wider choice of relations which might be introduced into positive law, and to give more suppleness to juridical innovation."¹

It would indeed be valuable, this science which would present to the politician and lawmaker all possible solutions of a given question, and would completely detach the function of research from that of evaluation.

At present, the same mind is obliged to undertake simultaneously two tasks which are logically foreign to each other; to discover all the courses it is possible to follow, and to judge which is the best of these courses. Of these two tasks one is prejudicial to the other. An ingenious mind tries to force the acceptance of a juridical find which it thinks perfect, because it has discovered it; while a conscientious, dull mind is too absorbed in the examination of one or two extreme solutions to suspect the thousand intermediate solutions which might satisfy every exigency.

Let us suppose a cut and dried table of all the combinations possible upon a given juridical question to be in general circulation. The politician would have to renounce any claim to being an inventor; he would remain simply the judge of values and could concentrate all of his intellectual force upon the function of passing such judgments.

Such a division of the intellectual labor of the politician and lawmaker would undoubtedly be most successful. Is it a possibility? Within certain limits, it is assuredly possible. Roguin himself has given us an example of it by constructing at the end of his volume a system of the elementary principles of intestacy.² Every existing or imaginable legal system should be traceable to one of the four or to a combination of the four principles discerned by the author.

¹ ROGUIN, "Règle de Droit," p. 15.

² "Règle de Droit," p. 420.

All the literature upon pure legal science with which I am acquainted could, in fact, be put in a nutshell. Must this literature be developed? In my opinion, one renders small service to humanity by trying to weigh it down with a new discipline. But if, on the other hand, it is a question of working out simply and quietly in the study under the lamplight, what is actually done amidst the agitation of legislative assemblies, the task of the conscientious law-maker will be rendered only the more secure.

These practical questions are of secondary importance for us. From the historical and philosophical point of view two questions present themselves:

(1) What might be the logical value of a pure legal science?

(2) Would it be an innovation or would it have its roots in the past?

(1) Can we draw up a logical table of all the possible solutions for a given juridical situation? and if so, by what method? Certainly, it is possible. For this purpose it is sufficient to establish a series of propositions that are strictly disjunctive and do not allow any place for a third hypothesis, or of those which are trijunctive and allow no place for a fourth proposition; and so on.

Disjunctive Propositions { If A is not B, it is C.
If A is not C, it is B.

Trijunctive Propositions { If A is neither B nor C, it is D.
If A is neither C nor D, it is B.
If A is neither B nor D, it is C.

The two terms of each proposition should be absolutely contradictory to each other and accordingly form alternates.

Thus, applied to a law:

(a) With the sexual relations between men and women the law can or cannot concern itself.

If the law does not concern itself with them, there is no family law. If it does concern itself with them, there is a family law.

(b) Suppose that the law concerns itself with the sexual relations between men and women, it can then sanction collective unions or individual unions. In the second case only will there be marriage.

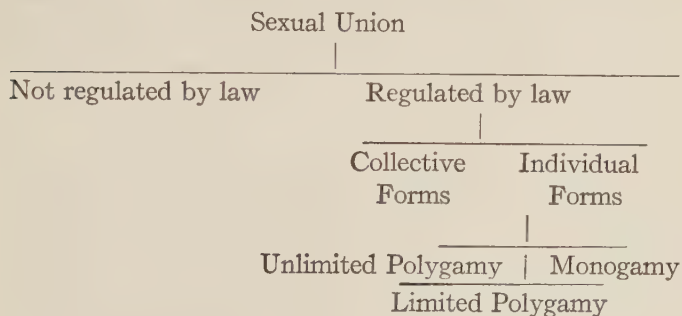
(c) Suppose that the law sanctions unions between one man and a certain number of women, this number of women will be limited or not limited.

(d) If it is limited, it may be limited to one, to two, or to more than two, etc.

Each branch, neglected for a moment, may be taken up in its turn. Thus a complete table of all the possibilities of an institution can be framed.

(2) Is such a work totally foreign to the intellectual habits of jurists and can anything like it or at least analogous to it be found among the jurisconsults of the past?

In the first place, it must be remarked that series thus arranged would be rather cumbersome and monotonous for works of small compass; and that a diagram implying the general formula is at the same time simpler and clearer:



Now diagrams of this kind are met with in a good many works on juridical questions. In the Roman law

of the Middle Ages they were called "distinctiones." These "distinctiones" relate to any juridical idea whatever and examine "in an order of decreasing generality" the various combinations into which this idea may enter. Later, these "distinctiones" take the name "typi." They are then more fully developed and conducted with more attention to details. We may cite for example the "Typus Exceptionum" of Rebuffus, inserted in numerous editions of the Digest under the title "Exceptionibus" (XLIV. 1).

Outside of this scholastic tradition Austin illustrates his Philosophy of Positive Law with a number of diagrams upon the sources and the aim of laws, the various kinds of sanction, damages, fault, the "forma imperii," the "forma regiminis," etc.

These various works approach very unevenly what should logically constitute pure legal science. For a science of this kind should have as a characteristic the disentanglement, aside from all observation, of alternatives which are strictly logical and universal. Now the object of these various diagrams is primarily pedagogical and mnemonic. They summarize in a more striking form more fully developed statements. They state juridical questions "in the order of their decreasing generality," but do this by making an analysis of one or more systems of positive law; consequently they are the work of observation rather than of "a priori" logic. Therefore these are not tables of all possible solutions, but incomplete tables of solutions already invented.

It might be concluded from this that there is no resemblance between these various works and the investigations of pure legal science, as it has been defined. Such a conclusion would be partly true and partly false. Tables of the kind just illustrated are mixed. They arise from an inferior logical type, but end in one which is of a higher order from the threefold point of view indicated above. (a) In their origin, they are purely pedagogical and

mnemonic, but in the hands of ingenious jurists they become transformed into a method of creative logic from which new ideas and new points of view may arise. (b) They contain the greatest number possible of contradictory terms placed in striking opposition to one another. Even the oldest and most rudimentary — under the influence, no doubt, of scholastic logic — present true disjunctive propositions from which nothing is to be taken away. (c) In their origin, they are summaries of concrete observations relating to a certain number of positive legislations; but they have a tendency to stray farther and farther from the field of experimental verification into that of the *a priori* and abstract logic.

Thus the “distinctiones” of the Romanists classify the ideas of the Justinian legal system. But this system contains, beside details which pertain only to the Romans, ideas which are universal or at any rate almost so, *e.g.*, mistake, ignorance of law, deceit, and fraud. The classification of all the possible forms of mistake, ignorance, etc., was not the product of a simple compilation of texts, but a rational work.

Besides, for the Romanists of the Middle Ages, Roman law and written reason were fused. To them, the Roman principles should be universal, and it was by virtue of this universality that their authority was imposed upon reason.

When Rebuffus draws up his “*Typus Exceptionum*” he makes the “exception” (plea) not a Roman but a universal idea. He sees in it a situation which may present itself at any time and in any civilization; that of the accused or the defendant who cannot deny the accusation or the claim directly, but has recourse to some round-about means, an accessory circumstance, or an excuse to free himself. And he expresses his idea by the aid of a simile. It was Adam, the first father, who invented, at the moment of the original sin, the first plea of pro-

cedure. Accused of having eaten the apple and not being able to deny that he had been forbidden to do so, he insinuates quite respectfully that the Eternal Father might well be the principal culprit in the whole affair. "*Mulier, quam dedisti mihi sociam, dedit mihi de ligno, et comedi.*" If he had spoken frankly he would have said, "I disobeyed you, but it was you who gave me the woman who incited me to disobedience." Moreover, with the nonchalance of a supreme tribunal, Jehovah avoided any definite answer to this first "exception."

Under the form of this simile, Rebuffus of Montpellier certainly meant to express that he had compiled his "Typus Exceptionum" above Roman law and above all positive law, in complete abstraction. With Austin, the abstract character is more striking still, although his method is always a little ambiguous.

A thorough study of these juridical tables would bring to light an intellectual phenomenon which is not very frequent, that is, the transformation by insensible degrees of a science of observation into an "a priori" science, a transformation which brings with it new importance and new authority.

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CHAPTER XIV

METAPHYSICS AND LAW

§ 1. METAPHYSICAL THOUGHT.—§ 2. TRANSCENDENT JUSTICE: (I) POLITICAL SOLUTION; (II) SUBJECTIVE JUSTICE; (III) COLLECTIVE CONCEPTION OF JUSTICE; (IV) MUTABLE JUSTICE AND IMMANENT JUSTICE; (V) IMMUTABLE AND TRANSCENDENT JUSTICE.—§ 3. METAPHYSICAL LAW AND MORALITY: (I) METAPHYSICAL LAW DISTINCT FROM MORALITY; (II) CHARACTER OF JURIDICAL DUTY.—§ 4. METAPHYSICAL LAW AND POSITIVE LAW.—§ 5. IDEAS DERIVED FROM THE IDEA OF JUSTICE: (I) METHODS OF DERIVATION; (II) ANALYSIS OF SUUM CUIQUE; (III) GOVERNMENTAL JUSTICE; (IV) INTERNATIONAL JUSTICE.—§ 6. THE OLD NATURAL LAW: (I) REASON; (II) NATURE.—§ 7. THE HISTORY AND THE METAPHYSICS OF LAW.

§ 1. *Metaphysical Thought.* Twenty years ago, with the hardly laudable object of offending simple and pious souls, a group of lecturers traveled through France, even into the smallest towns, offering for public discussion the same thesis, which was placarded in profusion upon every wall: "The God hypothesis becomes less and less probable." The "God hypothesis" was quite as popular as was, some years later, that of "the burnt out stars." It met with the same success of enthusiasm and scandal.

To tell the truth, it deserved neither the success nor the obloquy. "God" is a metaphysical, and hence a hypothetical, conception. But metaphysical conceptions are not submitted to the calculation of probabilities. To consider the possible solutions of the great problem of the universe, as so many race horses with greater or less chances of winning the race, is scarcely scientific or philosophic, but very human. The "God hypothesis," quite like the "no-God hypothesis," can neither lose nor gain anything in logical value from the fact of the existence of

the experimental sciences to which it is entirely foreign. It may lose or gain in authority, according to circumstances, over the vacillating psychology of humanity.

Metaphysics consists of a series of hypotheses upon the unknown conducted according to the methods of rational logic. It is justified in pure logic. The conjunction "if" is an essential element of the logic of mathematics. Metaphysics, to remain logic, should establish as hypothetical what is hypothetical, and as positive what is positive. The conclusion of a course of metaphysical reasoning should contain exactly as many hypothetical elements as there were in the premises. Metaphysical labor should never result in increasing the probability of any necessarily invariable solution. It only permits that everything contained in the hypothetical data be accounted for. In this form it is equally legitimate and useful.

It is often said "Faith begins where scientific certainty ends." But this is false. Scientific doubt begins where scientific certainty ends. The domain of the uncertain is not necessarily abandoned to every whim of the imagination or fancy, or to every personal impulse. Doubt as to method may enter into and regulate it, and make it understood without depriving it of its uncertain character. Logic works by the same processes in the hypothetical that it does in the positive, although its task then is a little more delicate.

The word "metaphysics" is for many synonymous with vagueness and absurdity. It is a term much decried even in a scholarly atmosphere. But that should be a matter of perfect indifference to us. The word "philosophy" had quite as little prestige when I was young, and I recall having seen a scholar grow red with anger because one of his colleagues unwisely ascribed to him "a truly philosophic mind."

A celebrated free-thinker had determined never to pro-

nounce the word God. "It has not been without difficulty," said he, "but I have succeeded, thank God." Thus must we distrust those who claim never to make use of metaphysics. If they succeed, it is a wonderful feat of strength. Most often — if not always — when they think they have succeeded, it is because they are poor observers of their own thoughts.

For there is a very close connection between metaphysics on the one hand, and positive science and practical life, on the other. It must not be imagined that it has been or will be loosened. Only by an arbitrary agreement can the one be possibly separated from the others.

The most indispensable ideas of the most positive science lead to metaphysics those who wish to understand its nature and are not content with the superficiality of mere observation. Thus the ideas of cause and of space are essentially positive, and few practical minds deny their reality. But when the Brahmin Kanada, midst the forests of India, asked himself what is the cause of space and if space can have a cause, he propounded a lofty metaphysical problem. How many thinkers dissimilar in customs and intellectuality, scattered over the surface of the earth, have, unknowingly to one another, propounded the same question! And is it not striking that after centuries and centuries a man like Herbert Spencer, who had devoted so much effort to giving a positive and scientific explanation of the concrete world, should have presented again in almost the same terms the metaphysical thoughts with which the old Hindu philosopher had been preoccupied?

The foundations of all our logic are equally metaphysical. This is true of the "a priori" as well as of the "a posteriori," of induction as well as of deduction. If one is indiscreet enough as to seek a complete justification of the experimental method, or of the mathematical sciences, or to ask himself what observation can reveal to us concern-

ing the nature of things, one states just so many metaphysical problems. No doubt it is possible to stick to experience and logic, which alone can give results that are certain so far as our intelligence is concerned, and to neglect the forms of intellectual labor which can legitimately lead only to hypothetical solutions. But a sound mind should not shrink from the always insoluble, but deeply fascinating, riddles of existence. Metaphysical thought cannot be classed as intellectual or sentimental vagary. It is, on the contrary, the highest order of thought and one without which human civilization would be a trifling matter.

Practical life can dispense with metaphysical entities even less than theoretical life can. The beautiful, the good and the just can find no positive justification, and yet what would humanity be, deprived of these three conceptions? The belief in the transcendence of these three ideas has governed all history, and the history of law cannot be understood if one forgets that men have always believed in a justice which looks down upon the world.

Let us borrow a happy comparison from Binder with the idea of making it play a slightly different rôle. To explain the origin of a picture is to state the circumstances which produced it, the motives which impelled the painter and urged him to work, and the influences which made him choose his subject and treat it in a particular way. But, however detailed these explanations may be, they will not be sufficient. The painter wishes to create beauty; he believed in abstract and ideal beauty, in a confused way, perhaps, but he believed in it. For if he had had no belief in the beautiful, he would not have spoiled the paint and the canvas in order to create a useless work. In the same way, the more or less conscious belief in an ideal of justice has directed men in the building up of the law, and this belief constitutes a factor in history which cannot be neglected.

Therefore, it behooves us to disengage the metaphysical thought in the law, as a special form of thought, and to recognize its legitimacy and importance. But, be it understood, it also behooves us to limit its scope with as much exactness as possible. Especially should we avoid creating metaphysics without knowing it or admitting it.

Whoever abandons the domain of the positive for that of the ideal ought to know what he does. Truth is one; there is but one truth. As to the truths which we can grasp and define, our duty is to reduce them to unity. Such is the domain of positive science. Positive science is the science of truths which can be reduced to unity. Metaphysics is the science of truths which cannot, so far as we know, be reduced to unity. Our duty is to gather together all the solutions possible but to give preference to none.

§ 2. *Transcendent Justice.* "A king without justice is a river without water," says an Arab proverb, and, the king personifying the law, it may also be said, "A law without justice is a river without water." Neither reason, sentiment nor logic can give the law its content. They may dig its channel and provide it with banks, but justice gives juridical science its "*raison d'être*."

But what is justice? Among the metaphysical entities that guide us through existence, justice is the only one of which a clear and simple definition has been given for a long time. While it would be difficult, if not impossible, to define beauty and right, the two Latin words "*sum cuique*" — to everyone his own — are as precise and as full of meaning as a definition could be.

From the principle "*sum cuique*" one may, with only the coöperation of positive logic, deduce an infinite number of practical applications. This work in itself would have in it nothing of the metaphysical. An identical task might be fashioned upon any other principle, *e.g.*, "to every one, the goods of another." Positive logic cannot

explain why the "suum cuique" is better qualified to supply rules of conduct under certain circumstances than any other principle whatever. So the formula in itself serves no purpose, if one cannot see in it an ideal to which it is behooving to conform as far as possible. By what intellectual operation can we transform into an ideal a phrase which, logically, is nothing more than any other phrase? Such is the question which presents itself and to which various answers are given.

I: *Political Solution.* For a certain number of minds — more numerous perhaps than it might appear — the problem does not even exist. Justice is a word which has for them no real meaning; but it is a popular word and possesses, accordingly, a certain power of action. Likewise, it is always necessary to claim to act according to justice, but to follow in reality any other rule of more positive conduct. Thus certain rabbis say of certain psalms which are difficult to interpret, that they were made to be sung and not to be discussed. Very often, in politics, justice "sings itself." It is a beautiful rhetorical expression; and, to draw the crowd, rhetoric is as powerful as logic.

II: *Subjective Justice.* The conception of justice would be, in this second system, purely subjective. It would be produced by a certain mental state. As it could not result from any logical toil, it would be of an emotional or sentimental nature. It is obvious that the sentiment and the emotion of justice play a large part in social life. The sentiment is particularly respected as being the manifestation of an idea of justice. If this idea is purely an illusion, there subsists only a simple nervous state, and this nervous state can in nowise modify the logical nature of a formula. The "suum cuique," justice, exists no more in this conception than in the preceding.

III: *Collective Conception of Justice.* Justice is sometimes presented as the reflection of the collective con-

science. Its conformity to public opinion would constitute its value. But is there such a thing as public opinion, and if so, where is it to be found? Changes in opinion are contradictory and easily effected when one possesses political or financial power. By putting up the expenses, one might start a movement to compel people to walk upon their hands with their feet in the air. This idea of public opinion should be entirely disregarded in philosophy.

The sociologist-philosopher Vierkandt has tried to refine this idea by proposing to consult the "disinterested spectator," instead of the crowd. He observes that in every quarrel the motives which impel the contending parties to action are of a low order, while the opinion of disinterested spectators is based upon considerations of a higher order. Accordingly, in the psychology of the disinterested spectator there might be found the best criterion by which to gauge the justice or the injustice of a cause.

Psychological and historical observation compels us to beware of being deluded in this matter:

(a) Are there really disinterested spectators who can remain spectators? And if there are, are there many? Man's temperament is to take part even in disputes in which he has no interest. A dog fight will set a whole town to fighting. Given one bold valet, another valet passing the insult, and the gentlemen of old Verona draw their swords. To preserve one's sang-froid and judge objectively every element of a quarrel is an extremely difficult matter for an individual; for a collective body, it is an absolute impossibility.

(b) Furthermore, if disinterested spectators are better able to judge, they must nevertheless have a criterion in order to judge. This criterion can only be "*sum cuique*" justice.

This homage rendered to justice is a good thing, but does not suffice to explain its nature and authority.

IV: *Mutable Justice and Immanent Justice*. Many thinkers have tried to reconcile the indisputable variability of human institutions and conceptions based on justice and morality, with an idea of a justice which can serve some purpose. It is out of the question to examine all the systems which have attempted this reconciliation by avoiding the idea of the immutability and the transcendence of justice, which was supposed to be definitively overthrown. Can we conceive of an ideal which emanates from ourselves and changes according as we ourselves change? Can we have recourse to this ideal to guide us in our actions and in our judgments upon the facts of real life? Both are radically impossible; a mutable justice and an immanent justice are totally incomprehensible.

Has slavery ever been just? We do not hesitate to answer "No." Nevertheless, it has been very fortunate for humanity and indispensable in the development of civilization. Some slaves have been able to live a life which was much more pleasant and on a much higher plane, both materially and intellectually, than that of many free men. Thinkers among the ancients considered slavery legitimate. No doubt. But that has nothing to do with the idea of justice as summarized in the expression "*sum cuique*." To say that slavery could have been just is to rob the word justice of all logical meaning, or at least to give it another meaning. Now if we change the meaning of a word, the exterior form alone remains, but none of the inner elements are necessarily there. We cannot say that the idea of justice is mutable, but that the same word can be applied to different things, — a statement that is obvious but of no interest.

If justice is mutable, it will become resolved into a series of small forms of justice, each member of which is independent of the others and may be in opposition to them. How shall the conflict between these be decided? There is only one of them right for each period, it will be

said. But which one, and how shall it be recognized? How can one discriminate between what is just and what is unjust?

“Singulière fortune où le but se deplace
Et n'étant nulle part, peut être n'importe où.”

Mutable justice is devoid of logical meaning and practical utility.

Justice which emanates from humanity is no more comprehensible. We can take for our aim or our ideal only what is situated outside of ourselves. One can move himself only by placing his fulcrum on the outside. Children in a car think that they can hasten the speed of the train by pushing against the sides. They are victims of an illusion similar to that of those who believe that justice can, at the same time, emanate from humanity and serve some purpose to humanity. “The best dancer cannot dance upon her own shoulders,” said the philosopher Çankara many years ago.

V: *Immutable and Transcendent Justice*. Whoever demands justice or complains of an injustice, affirms by this very act, the immutability and transcendency of this idea. To deny this immutability or this transcendency, is to deny justice itself, or at least, to refuse it any ideal character.

Therefore all justice is metaphysical, that is to say, hypothetical. Confronting this hypothesis, three logical positions are equally legitimate:

(a) Either to reject the hypothesis and no longer invoke under any circumstances a valueless entity;

(b) Or to admit the hypothesis by an act of belief and affirm it as an article of faith;

(c) Or to admit it as a hypothetical principle because it is the sole hope of humanity for the future. There can surely be nothing lost by this stand and, it may be, something gained.

Immutable and transcendent justice is a metaphysical hypothesis, which is logically irreproachable if its hypothetical character is allowed. On the other hand, it is firmly based upon a practical consideration of the highest value for human civilization, namely, that of giving content and direction to juridical science.

What must we understand by transcendency and immutability? One is, to be sure, the corollary of the other.

Immutability alone can give a logical meaning to justice, and transcendency alone can explain this immutability. For the abstract conceptions of man are essentially mutable, and if the mind of man changes constantly, how can an immutable conception emanate from its psychology? There must be supposed at one and the same time, an intimate sense in man which guides him towards a confused ideal that he endeavors to see more clearly, and a moral power higher than man which comes to certify to him that what he believes he sees above him really does exist.

When Christ pronounced the words in the Sermon on the Mount, "Blessed are they who hunger and thirst after justice, for they shall be filled," or when Plato addressing the two old men of Crete and Lacedemonia, said, "I shall endeavor to speak to you of justice in itself" — that is of the justice which forms a part of the eternal verities and of which man shut up in the cave perceives but the shadow, — both promised the confirmation, in a superlogical world, of a human and logical formula, but one which, left to itself, remains devoid of all value or prestige.

It is certain that in order to undertake any work relating to the beautiful, the good or the just, man is obliged to claim for a higher power the consecration of these abstractions which his logic forbids him to claim for himself. Must we conclude from this that the position of

metaphysical justice entails a profession of religious faith and imposes belief in God? By no means.

No doubt, he who believes in God will be more ready to explain the nature of the ideal, by making of it an attribute of divinity or an emanation from his will. Still this explanation is not without difficulty, and theologians in many different religions have perceived this for a long time. The Hindu Brahmins, the Greek philosophers, and the Schoolmen argued at length upon the relations between justice and the divine will. For if God is all powerful, can he not change anything that he wishes to change? Can he not transform the very foundations of justice? If he happens to change them, can man reasonably recognize as immutable what is obviously mutable? According to the side which they take in these diverse controversies, acknowledged theists may unsettle and destroy the metaphysical idea which is necessary to man, and leave it in the same state of relativity and uncertainty as the most groveling positivism.

On the other hand, does the idea of justice, even for a theist, find its transcendency in God? Many philosophers who believed in the existence of God or of gods, did not believe in his or their justice. In our times, the two ideas are rather inseparable. But it is because the idea of God entails the idea of perfection that one cannot deprive deity of an attribute which is recognized as ideal even aside from him. Thus the transcendent nature of justice is, even for the most religious mind, above even that of divinity. It is therefore quite useless to plunge into theological complications which can be of no use to human logic. The problem of the existence of God is foreign to that of metaphysical justice and should be avoided by it.

If it were necessary to go back to divinity in order to establish the metaphysics of law, the clear and precise principle of transcendental justice would be quickly ob-

scured. For the idea of God may contain an infinity of attributes and we should be reduced to the Dædalian task of making them agree among themselves. The rigorous analysis which alone can furnish a solution would be definitely and permanently dulled. The chaos and the arbitrariness of the old natural law would again be established.

§ 3. *Metaphysical Law and Morality.* Then, should the Good and the Just in a metaphysical generality be bound up in God? If they are both emanations from the divine will, or attributes of the divine person, they ought to work together to the same ends, and be in harmony in their human manifestations. Any contradiction between them is impossible, because one cannot conceive of a human action commendable in the eyes of a divine will and, at the same time, blameworthy in the eyes of the same divine will. We are forced to this disastrous conclusion: Everything that is good is just; everything that is just is good. At one blow, the idea of justice is ruined for logical thought.

I: *Metaphysical Law Distinct from Morality.* This is what is done by a great number of legal philosophers who are not, moreover, all theists. They consider metaphysical law a part of morality. Few theorists know how to erect a strong and insurmountable barrier between the two disciplines. Morality is the study of the good; metaphysical law is the study of the just. Each of these entities should remain independent; they may very well be contradictory to one another. What is good may be just or unjust; what is just may be good or evil, quite as absolutely as what is just may be useful or harmful, beautiful or ugly.

It may be good to exercise a certain restraint on personal liberty in order to turn a people from vice and lead it to virtue, but this can never be just. It is very possible that in certain cases slavery is good; it is logically

impossible for it to be just. A good tyrant may bring happiness to a people, and a democracy, unhappiness. But democracy, whatever may be its results, will always be logically more just than despotism. In all spheres of social life, it would be easy to place goodness and justice in contradiction.

Those who have confused and still confuse law and morality do it, moreover, with the best intentions. They think that to point out contradictions between the two disciplines would be to weaken the authority of both. Would virtue not lose its prestige if it could be proved to be founded upon injustice? And the just which would favor vice might also be looked upon with an evil eye. Let us leave to humanity the illusion that the legislator can always be just and good at the same time, and that everything is for the best in the best of worlds. That is quite worth the strain on logic.

For us, nothing would excuse a strain on logic, since we are engaged in an intellectual task. But even aside from this decisive consideration, the confusion of law and morality seems to me to present the greatest practical dangers.

1. In order to be useful, the idea of justice must be strictly contained in the "*suum cuique*." We cannot deviate from the principle by a hair's breadth, under the pretext either of the social rôle which the individual ought to fill in this world, or of the preparation of the soul for a super-mundane destiny. If the formula of justice cannot be adapted to the cut-and-dried forms of the argumentation of positive logic, there is nothing left but to abandon it to its unhappy lot. Justice will then be:

- (a) A word which serves to enrich some and fool others;
- (b) A myth which allows the imagination to wander in fantastic regions;
- (c) A sentiment, an emotion, a nervous state.

And under these three forms, justice is nothing at all,

2. If metaphysical law is a part of morality, justice is an element of the good. The definition of the part presupposes the definition of the whole. We cannot state a definition of justice before we have stated a definition of the good. Now the good has not been defined, and much water will flow under many bridges before morality finds its formula. Morality is a form of metaphysics which is difficult and complex in a different way from law. It is encumbered with social and utilitarian prejudices, and it is difficult to see how it can be disengaged from them. To entangle the fortune of law with that of morality is equivalent to establishing a definitive check on the intelligence in the domains of high metaphysical thought. Will the idea of pure justice be able to escape all the interests and all the rhetoric which desire its destruction? I know nothing of this. But if it attains an entirely clear and independent isolation, by this fact alone, it will have rendered to humanity all the service which it could render it. Morality is its most dangerous companion.

3. The judges in any legal system should be obeyed. It is fortunate for everyone that, in the decision of controversies, they appear with the greatest moral prestige that can possibly be attributed to them. It is fortunate in one sense that the dispositions of the law appear to the contending parties as being at the same time just and good. Everyone will submit to them the more willingly, even against his interest. If, on the contrary, it is necessary to avow that some particular act of legislation or some judiciary decision is just but immoral, or moral but unjust, one will have fewer scruples about violating it or discussing its provisions. That is true. It is a good thing that the law inspires confidence. Nevertheless, this confidence must not be exaggerated. It is not a bad thing for the judge especially to know the relativity and the fallibility of human juridical principles. A little scepticism will render him more scrupulous, more indulgent to every-

one, and consequently more just. How many judicial mistakes, both civil and criminal, are born of the belief that laws are perfect in every respect. It is helpful to know that the law is often faced with the sad alternative of choosing between the good and the just.

II: *Character of Juridical Duty.* The obligation to do right constitutes moral duty; the obligation to act in conformity with justice constitutes juridical duty. But juridical duty is neither imperative nor categorical. Juridical duty is a line of conduct laid down by logic. Now logic gives no direct commands. "You ought to pay your debts" means nothing logically. "You ought to pay your debts, if you wish to conform to justice" is, on the contrary, a precise formula. Therefore, juridical duty is purely hypothetical, that is to say, the necessity of an action results from the hypothesis that one wishes to conform to justice. Accordingly, to introduce the *categorical imperative* into the philosophy of law would be to drive logic from it. It behooves us, therefore, to exclude it completely.

From the practical point of view, this is to be regretted.

The *categorical imperative*, the duty which arises in itself, obedience with no other motive than the rule, is an instinct, very fortunate for the masses, which greatly facilitates the progress of society. Historically, it may well be understood that a long discipline created in our mind this habit of obedience to certain practices, and that by degrees our own will has been substituted for outside tyranny. Hence, that vague feeling of constraint which words scarcely define. One can, no doubt, escape from this constraint; but it leaves the one who disobeys it with a certain rather superstitious fear, while it gives the one who obeys it that satisfaction of duty fulfilled, which is considered by many as a superior state of conscience. Practically, it is very reasonable to strengthen this sentiment and not to unsettle it.

Intellectually, hypothetical duty is much the higher of the two. He who obeys in order to obey may be ignorant of the good and the just; but he who obeys because it is good or just to obey is the only one who "puts the ideal into the real," to use an established formula.

§ 4. *Metaphysical Law and Positive Law.* For centuries and centuries metaphysical thought has been laboring to put the ideal of justice into juridical reality. Its work has been fruitful, and we are thankful for it. But its rôle has not been very well understood, and credit has been given it for much to which it is not entitled. The ideal of justice would not be sufficient to organize any civilization whatever. But, as a matter of fact, its rôle is not to organize but to appraise. Its evaluations are not even general and do not bear upon all the elements of law. The ideal of justice can only give directions which the law will follow or not follow, according to circumstances. It is therefore from its nature very different from positive law.

Positive law is essentially an organizer. Its essential aim is order. An injustice which does not disturb the established order concerns it only to a slight extent. Law should give satisfaction to all, especially to the more restless. Whereas in metaphysical law, which is a kind of logic, an injustice remains an injustice even when it is patiently endured. The gravity of the injustice is determined, not by the unrest which it brings to society, but by the degree of its divergence from the formula "*Suum cuique.*"

Positive law draws its inspiration from the just. But it follows quite as readily and according to circumstances the directions of the useful, of the moral, and even that of prejudice. Primarily it must satisfy the strongest of these. Its domain is thus infinitely larger. Certain rules of positive law are absolutely indifferent to the idea of justice; the drawing up of contracts, and the interpretative

rules of the will of parties, are nearly always of this nature.

In order to maintain order, positive law should foresee, make regulations, and lay down the principles by which future controversies will be decided. Now it is almost impossible to lay down a principle which cannot give unjust results under any circumstances. For example, it is necessary to impose certain periods for the performance of certain acts; but by the application of this principle, certain individuals may find themselves very unjustly deprived of their rights. In general, in order to judge a suit with entire justice, it would be necessary to examine all its elements, by placing oneself at the time of the suit itself, that is to say, by disregarding all general rules previous to the origin of the controversy, that is, all positive law. Free discretion alone could give absolutely equitable solutions to every concrete case. The judgment, the judge's decision, which is the normal conclusion of the juridical conflict, may be just incidentally but not necessarily so.

Metaphysical law and positive law have analogous but seldom absolutely identical elements. Many discussions between theorists of the law arise from the confusion between the two points of view. Thus the definition of juridical personality may be very different in one case from what it is in the other. From the point of view of justice, a person is every being who is capable of suffering from an injustice. If one dog is beaten because another dog has eaten the family roast, an injustice is committed. Carrying to an absurd extreme the theories of Descartes upon the mechanical character of the animal instinct, Malebranche kicked his dog twice, saying, "It does not feel." This is a very ancient opinion and one very difficult to sustain. The downward gradations of morality, sensibility and intelligence in the scale of beings are imperceptible; no absolute differentiation is possible. Every living being,

every form of consciousness, every subjectivity, has a right to justice, even without knowing it.

Personality as capable of obligations is less extended. The one who owes justice is the one who knows it. For in order to commit an act of injustice, there must be a certain degree of appreciation of justice. The acting force must no longer be a purely brute force.

In positive law, the personality may vary according to the country and the legal system. The law will be able to define for individuals the varied conditions of capacity, will, and social standing in order to attribute personality to them. Very often he only will be a person who is capable of going to law, conducting a suit, and maintaining his rights before the regular tribunals. No others will be complete juridical beings.

The problem of sanction is also very different in the two disciplines. In positive law, it may be said that sanction is the distinguishing characteristic of the juridical regulation, and that the necessity of sanction differentiates law and morality. (A question, moreover, which has been poorly studied and upon which it behooves us to speak with great reserve.) For metaphysical law, such a proposition would be untenable. It is differentiated from morality by its very object; the one being the science of the just, the other, the science of the good, — irreducible ideas. Sanction may effect one as well as the other. Our modern laws contain as much or more of sanctioned morality than of sanctioned justice, and in primitive civilizations the proportion of moral law is still greater.

One might thus run through the various elements of the two disciplines and contrast them. The essential thing is to take into account the fact that metaphysical law is not an ideal positive or Utopian law, but a science of simple logic. It does not propose to seek what "ought to be," a formula void of any logical

meaning, but what conforms or does not conform to the "suum cuique." This task can be accomplished with strictness and precision.

§ 5. *Ideas Derived from the Idea of Justice.* The formula "suum cuique" may, in itself and apart from any moral or social idea, furnish an infinite number of corollaries. It is not necessary to go beyond the most ordinary theoretical generalities to account for them. One is so accustomed to spend without consideration the treasures with which the idea of justice has enriched juridical thought that no attention is paid to it. Nevertheless, the historical development of law would be incomprehensible to one who would be content to be ignorant of them.

I: *Methods of Derivation.* One might develop the content of the formula by a deductive and geometrical course and draw out of it the infinite consequences which it is capable of furnishing. Thus the idea of liberty results from that of justice, through the fact that he who is restricted in his liberty has not at his command the disposition of his person or his goods, accordingly, "he does not have his own." Certain derivatives of a theoretical nature have been brought to light through means of abstract logic. Much more often the concrete circumstances of life bring about the recognition of certain secondary forms of equity. No people recognizes all the justice or the injustice in its laws and customs. But its attention is centered upon certain inquiries that are above the average. It sets itself to discover — if there is no opposition — the formula which can effect their disappearance and prevent their return. Thus we come to discover that it is unjust for an innocent person to suffer in place of the guilty one merely because the two are of the same nation or even of the same family; or for one person to be able to appropriate the property of another because he knows better how to repeat the words which must be pro-

nounced before tribunals, etc. There are situations in real life that reveal little by little the important consequences of justice which legal philosophy can afterwards systematize.

And so, even today, the practitioner continues his efforts to disengage new elements from the metaphysical idea of which he knows the formula, but not the nature and scope. Thus of relatively recent origin is the principle according to which the one who occasions a new risk to others in order to profit from a new invention should bear all consequent damages even when they occur through no fault of his. It constitutes an unadulterated derivative from the idea of justice. So, in international politics, the "right of peoples to dispose of themselves," if put in a form which would exclude all arbitrariness, would be an important gain for juridical metaphysics.

Quite to the contrary, theorists and legal philosophers — at least, those who are not content with hazy phraseology — do not dare to pronounce the word "justice," because if anyone should push them to the wall and ask them the meaning of this word and the "raison d'être" of its authority, they would have nothing to reply.

Legal philosophers are more particularly paralyzed in their efforts by the fact that they, nearly all, if not all, confuse the metaphysical basis of law with its justification. A law may be justified by considerations of the most varied nature. A law incontestably unjust may be perfectly justified in everybody's eyes. Take as examples the anti-alcoholic laws. If the dangers of alcohol are such that three-fourths of the population of a country are in danger of dying of consumption or delirium tremens, these laws are perfectly *justified*. It is logically impossible that they could ever be *just*, for they sanction restraint upon individual liberty and make all pay for the excesses of some. If such laws can be called "just," the word "justice" can no longer have any meaning whatever.

The legislator ought to have the courage to declare, "My work is unjust, but considerations of an important character compel me to violate justice." This straightforward declaration would permit of the administration of the sometimes salutary but always dangerous physic of injustice whenever it is strictly indispensable to the health of the social body. If, to be sure, one tries to establish the premise, in a political speech or a newspaper article, that restraint of personal liberty can be reconciled with the idea of justice, the means of doing this successfully in the eyes of even an educated public are easily found in the inexhaustible pliancy of rhetorical expression. This is to pervert the intellect by rendering impossible any logical elaboration of a juridical ideal; and this intellectual perversion seems to me more ominous to the future of humanity than any moral perversion.

Accordingly, it is fitting to allow each of us his place. To the politician, the task of manœuvring the mechanism of positive laws all of whose elements he does not understand, but whose movements he can approximately foresee by virtue of his wide experience. To the philosopher of law, the study of the just for the sake of the just, just as to the litterateur, the study of art for art's sake.

Those who try to weld together, immediately and directly, general ideas and everyday concerns of social life can create neither a work of art nor a work of science.

One of the most fruitful principles of modern scientific labor is the absolute independence of the theory and the practice of every discipline. However profitable for the theoretical and the practical sciences to stand in juxtaposition in the same mind, it is disastrous to join them together by any logical connection.

. II: *Analysis of "Suum Cuique."* A schoolman of the twelfth century, to whom the formula "suum cuique" might have been submitted for interpretation, would have

begun, according to the methods of Aristotle, by observing that it contains two elements:

(A) *Suum*,

(B) *Cuique*.

The method is a very old one today. Nevertheless, I shall not hesitate to adopt it, since I find nothing better for a brief analysis and classification of the best known elements of the metaphysical content of law.

(A) "*Suum*" epitomizes in itself the whole of unilateral justice. It comprehends the totality of the moral and material possessions which are the possible complement of personality; or in other words, all the objects utilizable in one way or another in the development of a subjectivity. The estate of each individuality is in itself unlimited. Robinson Crusoe may take anything on his island that suits him without any limitation; he may do anything that he wants to; and if he does any work, it will be solely for his own benefit.

(B) But this estate unlimited in power ought to be granted to every "*cuique*," being. Each individual, to be just, should desire it for everyone else as well as for himself. In fact, the collaboration of individuals increases the assets to be shared. It increases equally and in very large proportion the difficulties of such sharing. The "*cuique*" restricts the "*suum*" and checks its power of expansion. The justice claimed by those around him alone limits the justice of each individual. The "*cuique*" expresses therefore the justice of equilibrium. The combination of unilateral justice and the justice of equilibrium forms the juridical metaphysics to which care must be taken to add no moral or social idea whatever under penalty of destroying its logical meaning.

(A) *Principal Elements of Unilateral Justice.*

(1) *Subjective Right.* The "right" of each individual in positive law is the power of action which is allowed him by the legislator. The "subjective right" is the power

of action which is logically deduced for each individual from the formula of justice. The "subjective right" is therefore at the same time both metaphysical and hypothetical. Positively, individual rights do not exist except through force, in the sense that they are nothing in so far as they are not recognized through force. But the reasons for which force recognizes them may vary infinitely. Force is generally more interested in realizing order than justice. Often, order and justice harmonize in the same solution; often, also, justice may be the chief concern of the legislator, just as "subjective right" and "positive right" may accidentally be identical without ever becoming confused. "Subjective right" derives all its authority from pure logic aside from any question of its realization.

(2) *Individuolity*. The formula "suum cuique" implies that the laws derived from the idea of justice group themselves around the individual and have their "raison d'être" in the individual. In order to judge of the justice or the injustice of any law whatever, it is necessary and sufficient to examine how the condition of one or more individuals may be affected by it.

(3) *Liberty*. Liberty implies the absence of hindrance to individual activity whether physical or moral; the disposition without hindrance of the physical or moral person by his own self. To confine a man in prison, to compel him to work upon some specified piece of work, or to prevent him from saying what he thinks, is to take away from him that which belongs to him in the most intimate and indisputable way, it is accordingly depriving him of his own. Liberty therefore is one of the most essential elements of justice. Liberty is in itself absolute and unlimited. It can be restricted only by the liberty of others. The liberty to commit reprehensible and immoral acts — provided they harm no one — is as indispensable to justice as that to commit laudable and moral acts.

(4) *Property*. The formula "suum cuique" recognizes the fact that around each individual there is a nucleus of belongings, of animate and inanimate beings, which he can utilize to his advantage. It does not tell us, it is true, how this accessory exterior of each personality has established itself or why it would be unjust to deprive any individual of it. The formula presupposes that question solved, and its solution is not indispensable to the development of the idea of justice. Let us point out, however, the two most probable solutions.

1. *Development of Personality through Labor*. — Man has no subjective right except that of his own person. But through his activities, his labor, he creates new objects which would not exist if he had not existed. From labor and combinations which may follow it arises property, which represents the industrial and moral activity of the individual.

2. *Universal Vocation*. — Every objectivity may appropriate to itself everything useful around it. Everyone may take possession of what does not belong to anyone else. Wherever the being is not restricted by another being, it may develop indefinitely. Thus Robinson Crusoe could take anything on his island that he wanted. Thus one may acquire unoccupied land by occupying it.

The two theories have played their part in the philosophy of law. They have a historical, psychological or constructive interest. From the metaphysical point of view, the theory of the universal vocation of every subjectivity would be preferable; to demonstrate this would lead us too far afield.

Many ancient civilizations assimilated family rights with those of property. The father of the family had over his wife and children the same rights that he had over his slaves, who were themselves assimilated with inanimate objects. This state of affairs was evidently contrary to justice by the fact that the subjectivity of the

wife, children and slaves was sacrificed to one man. But in case every member of the family is able to attain freely his or her maximum of expansion or development, family rights may be compared with property rights.

(B) *Justice of Equilibrium*. Since every personality has the same right to expand without limitation, each is obliged to endure restrictions which are necessary to the expansion of the personality of others. Thus each one's liberty and property are limited by the liberty and property of others. One fulfills his duty toward others when he respects their rights. Duty is therefore negative in principle. The more persons living in a small place, the narrower becomes the domain of each, and the more he is compelled, in order not to injure others, to submit to a multitude of material and often moral regulations.

The whole of the justice of equilibrium is summed up in respect for the liberty, the personality and the property of others. Metaphysically a distinction must be made between ownership of inanimate things and that of animate things, things endowed with consciousness and capable of suffering. Anyone who has entirely within his estate an inanimate object may dispose of it without restriction. If the inanimate object is in the estate of some one else, he should refrain from it entirely in this respect. If the object is at the same time within his and another's estate, property rights of diverse nature will arise to regulate the action of each.

The ownership of animate things encounters a new limit in the object of ownership itself. In proportion as the right to free expansion of the owned being goes on increasing, the right to the free disposition of the being by the owner goes on diminishing. Thus, no one has the right to torture any animal. If it is a question of an intelligent animal which may have a vague understanding of justice and injustice, it would be committing an injustice to strike it without reason. From its embryonic

stage to its full physical and intellectual development, the human being passes through every stage. The rights of those who have given it life thus diminish gradually without, however, ever disappearing absolutely. Terminologically, the rights of parentage and those of ownership may be distinguished. Metaphysically, they are almost identical.

In the theory of contracts, the contrast between the principles of metaphysical law and those of the majority of positive laws, is particularly marked. According to the idea of justice, no one is ever "obligated" to another. The idea of obligation is reduced to respect for the estate of others. Whoever detains an element of the patrimony of another ought to return it; whoever detains an equivalent of the patrimony of another ought likewise to return it. All contracts have as their object the changing of the elements of the patrimonies of one or more individuals and replacing them by their equivalents. If the vendor would not give up the thing sold, or the buyer would not pay the price and would retain an equivalent, thus diminishing the patrimony of another, either would violate the principle "to everyone his own."

Accordingly, the principle that promise or consent creates obligation is foreign to the idea of justice. Respect for the promise was based originally on religious ideas; later, on considerations of personal dignity, order and general security. A minor who borrows money from a usurer at a usurious rate has made a promise of payment which is not legally valid. When he arrives at his majority, three courses are open to him:

(a) To restore neither the capital nor the interest, which would be permissible by law, since his promise has no legal force. By acting thus, he would commit an injustice, as he had benefited by the goods of another. Injustice, but legal, without doubt; morally justified, perhaps, but injustice.

(b) To reimburse the capital and the legal interest. In which case, he would do more than the law demanded, in order to satisfy the idea of justice.

(c) Finally to reimburse the capital and pay the illegal interest. In this case, he would decide that to take refuge behind legal prescriptions in order to repudiate his promise, would be a lessening of his personal dignity. He would prefer to suffer an injustice in order to preserve his word at its maximum value.

It may be seen by this example that however lofty may be the moral import of the obligatory character of the promise, it can never be traced back to the idea of justice.

It is plain that if anyone promises a friend to give him something and does not do it, he does not commit an injustice, — at least, understand, when his promise does not wrong this friend indirectly. Whoever promises to sell an object which belongs to him for a trifling sum, and does not deliver, fails to keep his word but does not commit any injustice. If he keeps his word and gives up the object for the price agreed upon, he will be acting honorably but will be committing an injustice to himself.

For a contract to be just, after its execution the patrimonies of the parties to it, although changed in their nature, must remain equal in value. If, as a result of the contract itself, there is an increase of wealth, this increase ought to be shared equitably by the parties.

Many jurists in the most widely divergent times and countries have been inspired by these principles. The Mussulman law tried to realize them wholly in its positive law of contracts. Every contract which procures an advantage for one of the parties through the fact that the two performances are not strictly equal in value, is an usurious contract. The “*ribâ*” signifies “increase” and also “usury,” since every increase in the patrimony of one of the contracting parties is an injustice as regards the other.

In practical life, it is very difficult to maintain strictly the principles of justice in matters involving contracts, and especially in commercial dealings. The order, the welfare, the material prosperity, and above all, the security of transactions are quite clearly opposed to ideal justice in transactions. If it is legitimate and even advisable to give preference in practice to the first-named considerations, the philosophy of law cannot neglect to point out the true situation of contractual law in relation to the idea of justice.

The applications of the idea of justice to criminal law are very well known and seldom disputed. The right to punish is — from this point of view — based solely upon the need of protection of personalities and their patrimony. That no one can be punished for the fault of another is one of its most elementary principles.

III: *Governmental Justice*. In principle, he whose individual rights are respected, from the civil as well as from the criminal point of view, ought to be entirely satisfied. It matters little to him to what he owes his protection. Whether it be a prophet, a warrior, an absolute monarch, an assemblage of nobles or of rich men, or a popular assembly, which protects every sensible being, the essential point is that justice be most truly respected in the individual. A government derives its chief justification from its works. Whatever its form or its origin, the degree of its respect for individual rights constitutes its true claim from the point of view of justice.

Civil and criminal justice is justice of the first degree. Political justice is justice of the second degree. It results from this fact that in order to obtain efficient protection for their individual rights, private citizens are obliged to pay something to their governments. If they give something from their patrimony and do not obtain this protection, they are deprived of the expected equivalent and the rule "*suum cuique*" is violated. So that if there are

constitutional forms which assure better protection to individuals for a less amount of money, these constitutions are the more just. It is therefore the right of everyone to choose, in so far as possible, the government which he believes the most just and the individuals he thinks the most capable of assuring him of justice.

Another consideration. Through the sums drawn from individual wealth there is created a capital intended to remunerate the government, that is, the persons who perform its functions. Every social organization creates, therefore, to the detriment of each individual, a new form of wealth over which, accordingly, each individual has a right. Every function of social protection is a value which cannot be attributed to any single person, but over which all have relative rights. Therefore, the assigning of public offices will be accomplished with more or less justice according to the different constitutions. The ideal would be for every citizen to become an officeholder in his turn, or that public positions would be drawn by lot. Serious practical reasons are opposed to these methods. Nevertheless, the constitutional history of many countries shows that the equitable distribution of public offices has been given careful consideration.

IV: *International Justice*. In international public law or law of nations, certain rules deal directly with the physical being of individuals and constitute rules of justice of the first degree. The relations between State and State concern justice only as regards the consequences which may ultimately fall upon private persons. The reaction may be more or less immediate, but the injustice commences only at the time when one or more individuals are affected in person or through their sentiments or their interests.

So it is in theory; in practice, it has been long since recognized that international affairs ought to be dealt with more circumspectly and equitably than questions

of civil or criminal law. Acts of injustice committed against individuals are more serious in theory, but less dangerous in practice than acts of injustice committed against collectivities. Just as rabbits are accustomed to being eaten, individuals are accustomed to injustices from their superiors, their equals and their inferiors. They become resigned to it very easily, and if they complain, they must occupy some privileged position to be able to attract any attention. To clash even lightly with the interests of a group, is to strike a beehive or an ant-hill; it will take a long time for quiet to be reestablished. As regards the making of international law, the difficulty is not to discover a sanction but to establish rules equitable enough to be accepted by all countries. In a civil code, justice may be treated very cavalierly. Those who are not satisfied cannot make much fuss. On the other hand, a code for nations would be a delicate thing to draw up, for the least injustice would rouse susceptibilities and undying rancor. Here lies the true difficulty of the future — which no one seems to suspect.

Some of the ideas we have just set forth will appear — and with good reason — to be entirely commonplace, while others will seem paradoxical. As a matter of fact, none of them are new. Both kinds are contained logically in the formula "*sum cuique*," and result from it necessarily without the intervention of any foreign conception. The ordinary derivatives, such as the prohibition of gain to the detriment of others, the principle of personal responsibility, and the limitation of everyone's liberty by the liberty of others, have been brought together in classic works and are stereotyped forms. But the necessary equivalence of performances will appear more unusual. These are deductions of the same grade, obtained by the same methods apart from any positive or desirable law. If all the derivatives have not been perceived in their entirety, they have been in detail; and it is thus that the

metaphysical idea of justice has played a considerable part in the history of law.

§ 6. *The Old Natural Law.* "The irreducible natural law," Professor Géný calls it. This profound and scholarly jurist has minutely analyzed the most modern systems of juridical philosophy. He has made a kindly and impartial criticism which allows nothing to be lost that can be utilized. He has tried to make the scattered efforts of theorists fit in together, and if he puts aside a great number of theories, it is not in order to reject all previous ideas and immediately build up his own construction. This construction should be the work of all, and he appeals to the most recent as well as to the most out-of-date schools. He gathers together all of those who base their systems on solid arguments. The classic systems of natural law are examined at the end of the work. Is that not the right place? They are there declared to be in certain respects "invincible." And upon the cover is inscribed like an epigraph: "The irreducible natural law." It is a very great success for a discipline which one had supposed condemned without further appeal.

However, while recognizing that it is impossible to fashion any philosophy of law without asking natural law for one of its foundations, notably the transcendence of the idea of justice, Géný has no intention to resuscitate the "Code of Nature," its naïve optimism and all the childish illusions of a period when the sweetness of life was better appreciated than the art of reasoning. Natural law, according to Géný, can only give direction. It would have everything to lose by a minute regulation of the details of existence. It is, therefore, partly positive and partly desirable law.

This reduced natural law, which it would be unjust to hesitate to commend, does not correspond in its practical aim to the metaphysical law we have attempted to elaborate, but does correspond to it in the classification of

the diverse and varied intellectual forces that are combined in juridical discipline. The history of law is an element in the great history of human thought. No one who fails to take into account its psychological complexity can, according to my view, understand it. Now all the civilizations of the past have had systems of legal metaphysics. They have recognized the idea of justice, have made solid deductions from it and often applied it practically and ingeniously. But no positive law has applied it regularly and constantly, to do which would be impossible even in our day, and will probably always be so.

Ancient thinkers — like many modern ones — believed that justice was the supreme justification and injustice the supreme condemnation of any law. In the face of institutions which were dear to them but not in accord with the formula "*suum cuique*" reduced to its simplest expression, they invented processes of justification applicable to everything, which had a semblance of logical form but were in reality entirely arbitrary. In them the idea of justice was subordinated to two indefinable entities, reason and nature.

Natural law is that which is disengaged from nature through the effort of reason alone. The principles of justice are quite as rightful a result of this collaboration as are many other principles.

I: *Reason*. This word may be taken in the most varied senses. It may be applied to the logical faculties of the human mind, and to the labor of intensive thought, as well as to the vaguer, unmotivated intuitions that are aroused by habits and current manners.

If natural law were a work of pure logic, it would not be within general reach, for however simple the first principles may be, work rigorously deductive rapidly becomes difficult to follow. All mathematics rests upon extremely simple principles but cannot be pursued far except with

very severe mental tension. Works on natural law have never been of this character. The most complex problems they contain are solved easily and pleasantly. The most ignorant and inattentive will understand best and be the most thoroughly convinced. Those who read with too careful attention will be bad pupils — they will remain sceptical and profit least by the teaching.

“God must have given to merely reasonable man the lights necessary to govern his welfare and, accordingly, to discover without effort the principles of what is good and just,” said Barbeyrac. Aside from any religious question, a celebrated legal philosopher of the nineteenth century, in order to justify a pleasant but rather light work which had just come from his pen, wrote, “Do not reason too much in law.”

The *reason* of natural law is therefore an undefined psychological state, a sort of divination, intuition or effortless understanding, of which a very ordinary brain would be capable. It would correspond to the minimum of intellectual power that could be demanded of a human being. This extremely meagre faculty would derive its value from its universality. Can we indeed idealize cerebral labor of so low an order and claim its product to be the most precious element of juridical science?

Arab philosophers have at least had the merit of seeing the difficulty. For them — or at least, for some of them — the reason which reveals justice is not the ordinary reason of the public engaged in the struggle for life. It is the reason of the best minds at the most serious moments of their existence. Justice is unveiled to him who meditates upon death, to him who, above all earthly interests, can contemplate law as a pure and simple abstraction that directs humanity without appealing to its passions. The thought of death prepares one to understand justice. The bringing together of these two ideas is astonishing at first glance; only by degrees is the sublimity of it under-

world. The intellect thus purified by the absence of the interests of everyday life is without doubt better fitted to discover the ideal law; nevertheless it does not possess enough authority for one to trust to it alone.

II: *Nature*. This word is even more vague than the word *reason*. What nature? "The nature of things" answer the theorists who wish to be more practical. That explains nothing. What nature of what things?

The glossators pointed out that the Roman jurists extolled the word "*natura*" in a dozen meanings and their analysis was not especially strict. Whoever would take the trouble to investigate in detail the different meanings of this expression in the principal works on natural law in the principal countries, would perhaps come very near to a hundred. The Greek *φύσις* is affected by this same vagueness and adapts itself to every system of philosophy. Anything can be gotten out of such an ill-defined expression. "Nature" may designate as well the physical properties of a body, the force which manifests itself in animate beings, or the logical consequences of a stated principle. "Nature" represents sometimes a spiritualistic and sometimes a materialistic divinity.

Its most exact meaning would be the physical properties of things which certainly act upon laws. Thus a region which suffers from drouth will probably be acquainted with legislation in regard to irrigation, unknown in a country where the soil does not require watering. The material nature of things may dictate measures of utility, not those of justice. It can never serve to appraise the moral side of the law. Moreover, if the physical nature of things sometimes intervenes in a theory of natural law, no attempt has ever been made to erect an entire system upon it.

Since the two bases of the discipline are defective, the discipline itself is condemned by this fact. Many other

faults might be found with it, but we have no intention of going through the list. It may be remarked, however, that the marriage between Reason and Nature, the action of the one upon the other, is far from being easily understood and will be explained by philosophical fancies rather than by sane logic.

Thus according to Berkeley, "Nature is a thought of God's, impressed upon human thought." Here the intellectual and internal element absorbs the objective and external. For others, on the contrary, it is nature which absorbs reason, it is she who is the reasonable being. In this they share the opinion of a philosopher-poet:

"Oui nature, ici-bas mon appui, mon asile,
C'est ta fixe raison qui met tout en son lieu."

Natural law is an old compromise between an old system of metaphysics and an old positivism. It involves a deification of nature that no religion can reject, since for all religion nature is a divine work.

Likewise atheists formerly accepted it willingly, for they were able to conceive it under a purely material form. But the logician refuses to ratify this compromise and asks that metaphysical suppositions be clearly distinct from any positive or natural elements. To give the name "natural" law to the metaphysical elements of law would be a fatal misconception which must be avoided at any price.

§ 7. *The History and the Metaphysics of Law.* The manifestations of the idea of justice in legal history have occurred under two different forms: (a) Under a concrete and practical form, by the substitution of more equitable for less equitable institutions, through the introduction into legal technic of principles derived from the idea of justice; (b) under an abstract and theoretical form, by the elaboration of doctrines designed to connect law with philosophy as a whole and to give it the

prestige which thinkers have always attributed to speculative reason.

As in every question, the practical and the theoretical life of the idea of justice are independent of one another. In history, civilizations entirely destitute of legal philosophy are often seen to advance rapidly in their appreciation of the meaning of justice; and other civilizations with fine theories, to sanction very inhuman dispositions. The agreement between theory and practice is accidental and not necessary. This is very easily explained by the fact that the theorist and the practical worker are nearly always two distinct individuals, and that even in cases where the two qualities may be encountered in the same mind, it is always, in fact, an impossibility for metaphysical thought, to entirely absorb juridical science, just as, inversely, the most positive practical worker cannot avoid completely every abstract conception of justice.

What influence the doctrines of the Stoics may have had upon the reforms in pretorian law, and the Scriptures upon English equity, it is difficult to say. It is perhaps not as direct as might be supposed. Those most devoid of any philosophical knowledge have metaphysical conceptions which they may apply frequently; it is only the systematization that they find impossible. This is generally the mental state of the practitioner. Thus metaphysical thought follows a two-fold course in the law, under a fragmentary and logically disconnected form in the intellectual life of the masses, and under a logical and systematic form in works on legal philosophy.

We shall content ourselves with pointing out the popular form, the study of which would absorb a large part of the history of law, and with making some suggestions upon the scholarly form and the way in which it has been manifested in humanity.

"Continuity" is often mentioned in the development of natural law. If by this it is to be understood that the

principles of legal philosophy have, in the course of progressive evolution, assumed more and more breadth, precision, and efficacy, nothing would be more erroneous than to affirm this continuity. The various civilizations have been very unequally favored by the philosophy of law. Thus jurist-logicians are seldom jurist-philosophers. The Roman jurisconsults and the Talmudists are in the first category, the Greeks and the Arabs, rather in the second. Thus one meets with very valuable monuments of legal philosophy in ancient times, while quite recent epochs are very poor in this respect.

In the days when the metaphysics of law flourished with the greatest splendor the same opposition was reproduced almost identically. Some are seen to affirm the transcendency of the idea of justice as an emanation from divinity, others claim that it springs from human thought and from its harmony with nature; others still, deny it any objective existence and consider it a purely relative and conventional conception. More irreconcilable attitudes could not be adopted; but, very often, the confusion in terminology conceals the opposition of ideas, and after the first reading of the works of two philosophers, one might be tempted to believe that they had said almost the same thing when they had said exactly the opposite.

1. Greece is one of the greatest strongholds of natural law. Her oldest poems, and her dramatic, oratorical and philosophical works, present equally varied and personal ideas upon the idea of justice.

The philosophy of law may borrow largely from ancient mythology as well as from recent philosophy. It will find there an inexhaustible wealth of conceptions upon the idea of justice. The divinities who represent it more or less are numberless. Each has its special character, rank, and province.

It is first of *Μοῖρα*, or *Αἴσα Μοῖρα*, that Homer speaks. A colorless and mysterious figure whose power is extolled

and dreaded, but whose traits remain shadowy. She rules the gods themselves and holds their destinies in her hands. Jupiter himself is compelled to obey her. She is Destiny, Fatality, but a Destiny and a Fatality which end by giving to everyone his share and preserve a sort of equilibrium in the universe.

Θεμís is in Homer the servant of Jupiter and is charged with the duty of summoning his council. Later she becomes the goddess of justice and the representation of positive law; but of an ideal positive law. She represents perhaps the ancient tradition of revealed positive law. The laws dictated to men by the gods, and the national customs inspired by the gods, are sacred. Human and divine justice are believed to agree.

Δίκη invoked by Hesiod is the daughter of Jupiter. Having descended to earth, she returns to heaven to denounce to her father the crimes of the great and of kings. She points out cases of injustice and sends punishment. She personifies an abstract and ideal form of desirable law; and represents doubtless the period when man began to doubt the sacred character of his positive law and to understand that there was something higher than the usages of his everyday life.

Νέμεσις is, according to Hesiod, daughter of Night. There were temples in her honor at any early date. Goddess of vengeance, she punishes the wicked. She is also the instrument of the jealousy of the gods. She incarnates two contradictory ideas; that human happiness is often arbitrarily destroyed by the gods because they are envious, and that it is nevertheless from the gods that justice emanates.

Finally the *Ἐρινύες*, the Roman "*furiae*," are much the most dramatic and concrete figures by which Greek mythology has personified certain elements of justice. They are connected with the *Μοῖρα* in a way that is rather difficult to grasp. They are the implacable administrators of

the severest punishment, but likewise the protectors of order and good faith. It is they, especially, who assure the fulfillment of promises.

During the mythological period of legal philosophy in Greece, the abstract meaning of the divinities we have enumerated, is often changed. Considerable effort has been devoted to an attempt to define their positions but without attaining any degree of success, such an attainment being probably an impossibility. Without disappearing entirely, mythological figures receded into the background, and in the rational period of legal philosophy in Greece, they claim nothing more than a formal interest. Thinkers endeavor to state abstractions which may serve as a basis for the idea of justice. Then they will speak of φύσις, nature; of Νοῦς Νόμος Γνώμη reason, intelligence; of Νομός ἄγραφος, law not promulgated, ideal law, as opposed to Νομός γράφος, positive law.

But every one takes these various expressions in the sense which suits him, φύσις, nature, may quite as well be the divine will, animal life, or an undefined entity; the λογός is for one, human reason, for another, universal reason, and the ἄγραφος νόμος, a religious, a natural or an ideal law according to the author. The whole terminology has to be examined with the greatest care before disengaging from it the ideas it conceals.

This rather confused terminology ought not to hide from us the wealth of thought in the juridical philosophy of the Greeks. To tell the truth, justice properly speaking, the "sum cuique," does not play an important part in ideal law. The general formula which comes nearest it speaks of giving to everyone "according to his merit," and therefore makes the vague idea of merit bear the whole weight of the edifice of abstract law. The majority of authors are concerned with much more distant considerations.

The traditionalists, such as the *Δίκαιοι* of Aristophanes, confuse justice with respect for ancient customs, bad as well as good. It is sobriety, and respect for parents, but also the sacrifice of intellectuality to physical exercises. Innovators catch a glimpse of the equality of classes and beyond that human equality. The idea of hospitality, a virtue recommended in ancient times by the goddesses of justice, becomes expanded. It creates, in an intermediate period, the principle that not only must a stranger be welcomed, but justice must also be rendered to him as to a citizen. It develops finally into the stoical morality that shatters definitively the narrowness of the national spirit which is a heavy weight on the idea of law. This new spirit is wonderfully well expressed in the famous formula, "I am a fellow-citizen of every man who thinks."

The ideal of many Greek thinkers is to bring the law under the rule of the harmony, the equilibrium and the moderation, which though distinct from logical justice seem to resemble it somewhat. Pindar was inspired by this ideal, and the Pythagoreans tried to realize it. Thus they recommend a constitutional system in which monarchical, aristocratic and democratic principles would be harmoniously combined for the greatest welfare of the city, freed from ancient rivalries.

Modern civilizations could still benefit from the riches of Greek thought. As yet they scarcely know the first elements which are summed up in Plato, Aristotle and the Stoic Zeno. What belongs to the three schools of which these three philosophers were the heads is confused under the expression "Greek natural law." There are, nevertheless, three different theories opposed in many respects. The transcendency of Plato is foreign to Zeno, who represents metaphysical immanence; while Aristotle prefers to dispense with everything metaphysical and conceals the difficulties of the great problem under a rather obscure terminology.

2. In Semitic legislation the Law of the Talmud is much more logical than philosophical. The textual argument by analogy or the "a fortiori" is much oftener in evidence than the argument of equity. The multiplicity and the complexity of rites and forms smother the more general juridical principles. The great value of this monument is in the subtlety of its logic. Certain passages, however, bear witness to lofty juridical conceptions and are akin to legal philosophy. A notable instance in the Talmud of Babylon is the tractate Synhedrin, particularly the Gemara (commentary) to the 1°-VI° Mischna in the first chapter. And in the same work, the delightful little treatise Aboth or "Maxims of the Fathers." Let us sum up from it that delicate and ingenious observation which gives four formulas of justice as it is practiced:

According to their character men adopt four different lines of conduct. "What is mine is mine, and what is yours is yours," says the ordinary man. "What is mine is yours, and what is yours is mine," says the man of the lower classes. "What is mine is yours, and what is yours is yours," says the pious man. "What is yours is mine, and what is mine is mine," says the wag. The pious man who puts himself at the service of another without wishing to take from him any of his liberty may seem a myth. In any case, he is a splendid ideal. As an offset, the realism of the fourth principle and its employment by a number of politicians will not be disputed.

3. In a general history of juridical philosophy, the Mohammedan law ought to hold an equal place with the Greek law. The general tendencies of its positive interpretation are such that recent researches have shown that it is essentially directed towards equity, moderation and abstract justice. Furthermore, it possesses a rich literature bearing upon the philosophy of law.

A great many commentaries that treat of the general principles of law arrange them according to periods, ex-

tending from the tenth to the eighteenth century of our era. The thirteenth and fourteenth centuries of the Christian era are particularly well represented. Unfortunately very few of these works are translated; many have not even been printed in Arabic. Besides, the principles of legal philosophy have to be disengaged from religious principles on the one hand, and from general elementary summaries, on the other.

The aim of several of these treatises is to explain juridical language and give advice upon the administration of justice and the art of pleading. Others express true theories of juridical philosophy accompanied by principles of religious conduct. Such is the treatise upon the basis of laws by Mohammed ibn Elfanari, who lived from 1350 to 1430 A.D. He labored thirty years on his work, in which he assembles the most general juridical principles, emphasizing alike the Koran, the "Sunna" (tradition), the "idjmā" (agreement of scholars), the "qīās" ("measure or analogy") and human reason. This treatise is entitled "Kitab fasūl albadaīci fi Osūl achcharaj'," "An Original Treatise upon the Foundations of Laws."

It may also be remarked that the Arabic language possesses a rich terminology for expressing the idea of justice: "adabun," "birrum," "haqun," "hikmatun," "ratlun," "adlun," etc. The wealth of the vocabulary is generally a trustworthy index of the development of the idea and the importance attributed to it. It would therefore be a very fortunate thing to be better informed concerning the natural law of the Islamites.

4. In spite of the unity of dogma, the Christian natural law presents neither unity nor continuity, if by continuity must be understood regular improvement in the same direction. If, on the contrary, it is a question of finding in the Middle Ages, in the very depths of the Middle Ages, the origins of principles which are fully developed by writers of the seventeenth century, the toil of investi-

gation will certainly end in attributing to these numerous precursors greater precision of ideas than the pupils possessed. We will not fix any "dies a quo" to the history of the doctrines of the natural law of Western Europe, for it would always be possible to move backward by some centuries the origin of theories which have perhaps always germinated in Christian civilization. In the thirteenth century, the philosophy of law is full blown. It is represented by four great classes of thinkers, whose methods and starting points are essentially different.

(1) The Romanists seek to develop the principles of natural law and justice by laying emphasis upon the texts of Roman Law; by compiling and systematizing all the formulas scattered through the compilations of Justinian. Certain glosses untrammelled by form are very rich in subject matter and have insured through the centuries a remarkable continuity of principles.

(2) The Canonists are also fond of laying emphasis upon texts and using juridical logic. Intellectually they are very closely akin to the Romanists. But they have at their disposal a much greater wealth of authorities which they can draw upon according to circumstances; the Bible, the Gospel, the writings of the Church Fathers, and secular literature. This wealth is not without danger for accuracy of thought. The whole of the *Corpus Juris Canonici* and its innumerable commentaries present a theory of Law which has its own characteristics.

(3) The Theologians start from the moral point of view. They wish to prevent man from sinning and to prepare him in this life for his eternal destiny. They believe that, even without reading or instruction, man can discern right from wrong. They meditate in order to hear the voice of their conscience and to point the way of salvation to those who have not the opportunity to meditate.

(4) Finally, the so-called Scholastic philosophers who are impregnated with the spirit of Aristotle or of Plato,

or who, at least, seek in the works of these two philosophers the metaphysics necessary to complete the Christian belief. We may name Duns Scotus, Occam, etc.

As a matter of fact, the four schools do not preserve their original parallelism throughout their whole course. There is fusion and combination among them; the same mind is inspired by two different tendencies. Thus St. Thomas Aquinas is primarily a theologian; he is also a philosopher. In the thirteenth century, nearly all the Canonists are also jurists, and vice versa.

5. The fourteenth and fifteenth centuries are but little known from the point of view of juridical philosophy; which is not saying that they are lacking in interest. The four groups continue to work with a certain independence. Thus in 1374, Pope Gregory XI condemns as contrary to natural law certain institutions preserved by the *Sachsenspiegel*, notably, the ordeal, the exculpatory oath, compurgators, wager of battle, prohibition of marriage with a violated woman or the widow known in the life-time of her husband, the incapacity to make a will in time of sickness, the right of the heir to retain goods stolen by the ancestor; and so on. The scholars who commented on these decisions made natural law canonical. One might, on the other hand, compose a treatise on civil natural law, by collecting a great number of passages from Bartolus. Theological natural law would find numerous representatives, but philosophical natural law no longer existed or had been absorbed by one or the other.

In the sixteenth century, Spain puts forward three minds of the highest rank, Covarruvias, Vasquez and Suarez, the first two more jurists than theologians, the third, more theologian than jurist. Is there any trace of Arab influence in this juridical philosophy? This question has not been cleared up. It is certain, however, that in Spain the great Arab jurisconsults of the thirteenth century labored over the principles of law. A notable

instance is Abu Mohamed el Jezirichi who lived between 1129 and 1200.

The seventeenth century inaugurated the epoch of the laymen, — lay in relation to religion as well as to law. Grotius and his successors are too well-known for it to be necessary to introduce them. In essence, they are primarily compilers of the whole past, and rigorous logic is their least concern. They present to the seventeenth century a certain originality of thought, by which the eighteenth century was no longer to be marked.

The eighteenth century is the century when juridical ideas became popularized; it considered itself the century of philosophical clarity. Do not despise it; but let it serve as a warning to us. That superficiality which ignores the real difficulties of thought is embarrassed by nothing. An elegant form makes ideas popular, but only by depriving them of all precision. What is an idea without precision? An idea without precision is a paralyzed intellectual effort, often more dangerous than helpful. By popularizing many ideas taken from the old natural law, the eighteenth century brought the weak points of this law into the light and discredited it with serious thinkers.

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CHAPTER XV

LIFE AND LAW

§ 1. INTRODUCTION.—§ 2. INSTITUTIONS: (I) SIMPLE INSTITUTIONS AND JURIDICAL INSTITUTIONS; (II) ZONE OF VARIABILITY OF INSTITUTIONS; (III) VALUE OF INSTITUTIONS; (IV) AFFECTION FOR AND AVERSION TOWARD INSTITUTIONS; (V) PRESTIGE OF INSTITUTIONS AND THEIR DEVELOPMENT THROUGH ANALOGY.—§ 3. THE ECONOMIC FACTOR: (I) ECONOMIC PSYCHOLOGY; (II) ECONOMIC LOGIC; (III) INTELLECTUAL ADAPTATION OF MAN TO THE NATURE OF THINGS; (IV) INFLUENCE OF THE NATURE OF THINGS ON HUMAN PSYCHOLOGY.—§ 4. THEORY AND PRACTICE: (I) THEORETIC AND PRACTICAL FUNCTIONS; (II) THEORETIC AND PRACTICAL METHODS; (III) THEORY AND PRACTICE IN THE HISTORY OF LAW.

§ 1. *Introduction.* We very often contrast theory and practice, intellectuality and action, scientific law and life. These are rival forces which some try to reconcile, while others would like to encourage the warfare until one of the two should triumph definitively. In reality, they represent two kinds of minds which cannot understand each other and will remain in a state of eternal rivalry, or, at least (to speak for the present and the past) are and have been in continual rivalry. Collaboration between theorists and practical workers, although always by force of circumstances rather against the grain, is none the less necessary. Joined together without hope of a definitive divorce, they accuse one another mutually of egoism and lack of understanding, and perhaps neither is wrong. They displace each other in popularity according to the times and the public sympathy, and in general, a person prefers the one with which he has had least to do.

Thus among certain theoretical jurists, Life, Practice, and Action enjoy great prestige. These are for them

mysterious entities to which it is easy to attribute every good quality. They possess somewhat cabalistic virtues. One speaks of them with respect and fear, but without any especial attempt to understand them. It must be admitted, however, that until lately few jurists have made any very laudable efforts to point out precisely what is to be understood by life, practice and action. In order to leave to life the part that belongs to it in the elaboration of law, or to estimate what it has already done in the past, is it not necessary to know what it is?

This is perhaps not a very easy task and can scarcely be undertaken for the time being except under a conventional and arbitrary form. With juridical psychology, properly speaking, by which the technic of law is elaborated, may be contrasted non-juridical psychology, and in the second group may be put everything that is not contained in the first. Negative and rather unsatisfactory classification no doubt. Nevertheless, it will suffice to show the complexity of the phenomena which are imprudently associated in one and the same expression.

§ 2 *Institutions*. I: *Simple and Juridical Institutions*. Sometimes an institution is defined as an "established thing." This definition, which is not one at all, is no worse than any other. It proves to us, at least, that the word has no very precise meaning and that the elements invariably contained in the term are very meagre. The nucleus of the idea "institution" is only the habitual repetition by one or more persons, or one or more animals, of any act whatsoever. An institution is nothing else but a habit. There are individual institutions which do not differ in their essence from collective ones. Each person may create his own economical, religious and family institutions. They will be general without being collective, if they consist of acts of purely individual interest which have been adopted by the whole body of persons living in common. They will be collective or social if

they relate to the interests of the whole or of a part of the collectivity. Institutions become legal when any authority whatever imposes them by the strength of its will; they become juridical when they are analyzed, formulated and interpreted according to the rules of juridical technique. Institutions are changing constantly, and these changes constitute a large part of history.

The inhabitants of the town of Husal had acquired the habit of carrying bundles upon their heads. Nothing compelled them to do it, for every person could carry his bundles as he pleased. But it had become a general custom. Now on the Sabbath day, the Hebrews are forbidden to carry their bundles the same as upon other days of the week. Accordingly, when the other Jews could carry certain objects upon their heads on the Sabbath the inhabitants of Husal could not. Here a simple individual habit which became generalized, was taken into consideration by the religious and legal authority and was afterwards commented upon by juridical science.

Institutions enter and leave the legal and juridical domain every moment. A great part of the legislator's labor consists of this movement of inclusion and exclusion. To endow society with a moral personality, to sanction its statutes, to create a government monopoly, and to inflict penalties upon certain acts not yet punishable by law, are so many movements of inclusion; on the contrary, to establish general freedom of association, to proclaim the separation of church and state, and to strike off articles from the list of offences are so many movements of exclusion.

The transition from the institution "de facto" to the institution "de jure" presents itself under a variety of forms which the juridical historian should observe very closely. Sometimes — especially in advanced civilizations — the development takes place almost simultaneously and in the same direction in both domains. It is possible that the

legislator may directly introduce a reform invented by himself which has never been put into practice anywhere before his decision. The "de facto" institution will be from its beginning an institution "de jure." In organizing a new form of taxation, for instance, the authority in power makes an innovation without the collaboration of those who are to be subject to it.

In other instances — especially in primitive civilizations — institutions are organized down to the smallest detail and perform their offices with a considerable degree of regularity before authority concerns itself with them. Very often it intervenes then only to protect the weakest elements, those most exposed to attacks, or those whom the power is best qualified to protect or has the most interest in protecting. It is only gradually that it comes to include the whole round of elements. In this case, the history of the formation of the institution is entirely independent of the circumstances which brought it into the legal or juridical consciousness.

The institution of individual or family property is infinitely older than its juridical definition and description. Appropriation of land particularly, its administration and cultivation, the distribution of its fruits and all its benefits, and the methods of transmission by sale or in case of death, these became established in the state by family or tribal usages, outside of the religious or the secular authority which represented sanction, that is to say law. The authority in power began by granting property a partial and accidental protection. The king, who held the police power and was interested in the maintenance of order, intervened only in cases where there was a disturbance of order, or where acts of violence were committed by two individuals or two groups of individuals who were trying to despoil one another. The intervention of the royal power, limited in the beginning to the maintenance of the peace of the group and to acts which threaten

most to disturb it, becomes more and more frequent and ends by protecting property in its every form and element. Juridical theory then draws the outlines.

Thus theft and plundering by violence are the first occasions which allowed law to concern itself with the institution of "property." Theft and violence mark the point where the actual custom enters the protection of the law. And this is of prime interest as regards the history of the relationship between the development of justice and that of individual or family appropriation. But property is perfectly established under an extrajudicial form, when this connection takes place. The psychological phenomenon of appropriation is most certainly anterior to the creation of measures of defence against thefts. This is not simply a truth derived from logical evidence. It would be very easy to multiply historical proofs of it. In times when all thefts did not justify the intervention of justice, there existed almost complete systems of inheritance and processes of alienation which implied the existence of a property institution already complete in every detail.

II: *Zone of Variability of Institutions.* The human mind is so constructed that it is childishly delighted over the similarities and dissimilarities in human customs and institutions. When the traveler finishes recounting in his own country the impressions of his travels, his auditors ask with the same astonishment: "How can they have customs so different from ours?" and a moment after: "How can people whom we do not know have customs so like ours?" And the science of legal history, in the person of the great minds which represent it, is not exempt from this alternate surprise at the great difference and the great resemblance between human institutions. This does not mean that the problem of the likeness and unlikeness of institutions and their development in their progress toward civilization is to be scorned. Far from

it. It is the problem "par excellence" which the juridical historian should put to himself. It is an extremely difficult one and it cannot be hoped to be solved for a long time. It is not necessary therefore to suppose the problem solved and to be content with verifying historically the identity of the solution in the most diverse legal systems. Furthermore, it is no more necessary to point out systematically the differences. Suppose an ethnologist who had repaired to a comparatively unknown land, should have all the inhabitants march before him and confine himself to stating in regard to each individual, "He has a nose, two eyes and a mouth." That would serve no great purpose.

In the evolution of law there are certain likenesses in institutions and certain likenesses in the development of institutions which are to be proved. But when they have been proved with accuracy and certainty, it is well that they should be explained philosophically. If this explanation is impossible without data, any investigation necessary to attain it should be made.

At no moment of its existence does an individual or a people enjoy unlimited freedom in the creation of institutions. Hercules hesitated between two courses. Others may have found themselves at a point where cross-roads lead in more than two directions, but at every moment the choice is limited to the number of possible solutions. What limits the choice of a line of conduct by an individual or a people?

(a) It is limited logically by the number of available solutions. Aside from every concrete consideration, the number of processes by which the succession of an individual may be regulated is limited. Therefore, every institution is limited by the construction of possible or imaginable solutions.

(b) This choice may be still farther limited by the fact that all the solutions imaginable are not within the

range of material realization. Thus general polygamy could not be established where there were many more men than women.

(c) By the collective or individual psychology which imposes upon the man or the group a certain choice among the solutions possible at a given moment.

One cannot understand the reason why a people adopts a given institution at a certain time in its history if one is not acquainted with the totality of the logical, material and psychological possibilities at its disposal at that moment. If given the situation A identical among an n number of races, we prove that they have all adopted the solution a , this single fact by itself is of no significance. For it might have been that this problem could have logically had but a single solution. If, on the other hand, a thousand solutions corresponded to the situation A and nine hundred and ninety-nine had been unanimously neglected by the different systems of legislations in favor of a single one this consideration would be of quite another interest and would conceal something of great importance relatively easy to discover.

Without blaming the generalizations which may have been made under the impression that they were differences or resemblances between institutions, we shall consider them as methods of work, but in another way, as philosophical interpretations of the history of law.

III: *Value of Institutions.* From the logical point of view, to say that one institution is worth more than another is equivalent to saying nothing. The idea of value in itself has no content. It is necessary to choose first of all the scale according to which anything whatever possesses more or less value. A moral ideal may be chosen as a scale on condition that it can be defined. The ideal of justice may be chosen since it can be strictly defined. The intellectual development of the whole of the nation, the material prosperity of the people, or even the

sentiment of national pride may each be taken separately as the criterion by which to measure institutions from a single point of view.

Having chosen a standard, it is possible to compare with this standard various institutions of the same nature and to tell which one is worth more than the others. So that having chosen two institutions, we can measure them with the yard sticks of morality, justice, economics, patriotism and so on, and each of these operations may give us a different result. Thus it would only be by a very extraordinary chance that the institutions would always rank in the same order according to the various standards, and that one of them would be, with respect to the others, at once the most moral, the most just, the most desirable from the point of view of economics, the most patriotic and so on.

Since, according to circumstances, one standard or another is often taken without any indication as to which one has been chosen, the majority of judgments of values are robbed of any logical character. If we take as the criterion "justice" as defined by the "*sum cuique*," it is possible to say which one of two institutions is the most just. Still, it is necessary to distinguish between individual justice, or justice of the first degree, and political justice, or justice of the second degree. Let the "democratic republic" be compared to the "absolute monarchy." As regards political justice, the "democratic republic" is certainly always superior, through the fact that a true democracy tends to make the whole body of citizens share in the advantages of power which are produced by the whole body of citizens. But in the matter of individual justice, it is impossible to give so plain an answer. According to the temperament of the people, a democratic form of government can give very excellent or very deplorable results. For if in exchange for the right of dropping a slip of paper into a ballot-box, a class of citizens

sees itself despoiled of life, liberty and property, it would be very difficult to say that justice would accrue to these citizens from the adoption of such a system. Political justice is only very secondary in relation to private justice.

IV: *Affection for and Aversion toward Institutions.* Logically speaking, one should look upon all institutional forms with the greatest scepticism, for none of them necessarily contains justice, nor right, nor material or intellectual prosperity, and still less all of these virtues at the same time. It is indeed difficult to calculate what proportion of one or the other of these virtues each institution may contain. Prudence, reserve and some degree of hesitation in such an estimation would be quite in place. In reality — and throughout the whole course of history — men exhibit great feeling in regard to certain of their institutions. They love or hate them intensely. They are often ready to give their life to defend those which are already in existence or introduce those which they have invented. The abstract principles of law and justice leave them, on the contrary, nearly always totally indifferent. A historical reason might be given for this illogical attachment. In primitive ages, many races believed that they had received their institutions from the divinities that they worshipped, so that long psychological habit led them to make divinities of their customs even in epochs in which they had lost all religious beliefs. But perhaps this historical explanation is needless. This unreasoning affection belongs to the general psychology of humanity, to its mystical, constructive character, and to the simplicity and onesidedness of its intellectual elaboration. Love of institutions contains the poetry of habit for the conservative, the poetry of vision for the radical. Is it desirable that humanity be deprived of these pleasures although they are not without danger?

Attachment to institutions is without any great inconvenience when it is shared by the whole body of citizens

or members of the same group. But differences of opinion upon very trifling questions may lead to the bloodiest conflicts and the most enduring hatreds. In view of such instances one may ask oneself whether a little scepticism would not have spared humanity many sorrows. Besides, all institutions are not equally cherished or despised. There are those which remain in obscurity and for which the public at large cares little; these are the best. There are those which excite enthusiasm at first and then lose all of their prestige; let us still class these among the best. For when affection and adulation are heaped upon institutions, all of their irregularities are overlooked and this very quickly corrupts their nature. Those which legitimately held out the fairest hope have quickly succeeded in burdening themselves with faults or even crimes. Institutions without prestige are severely inspected; good work is demanded of them, and they set themselves to producing it in order to be tolerated.

These various considerations should not be lost sight of. They are very important to the understanding of the history of law.

V: *Prestige of Institutions and their Development through Analogy.* The fact that the different institutions in use by a people enjoy varying degrees of prestige in its eyes, is of great importance historically. In taking up one's position at a given period, it is necessary to distinguish the favorite, the indifferent, and the unpopular elements in the customs. The first named have a tendency to impose their form upon all the others. These will be the types which every institution already created or about to be created will try to resemble. They will direct the development in a similar direction of other institutions.

One must not confuse the rôle of analogy in the formation of institutions with that reasoning by analogy employed in juridical technic whose mechanism we have already studied. This last is a rational, conscious and

deliberate process; the analogous formation of institutions is unconscious, or at least, entirely unpremeditated.

Legal systems of about the same degree of civilization are nearly always composed of the same institutional elements. Whoever confines himself to seeking for and substantiating their presence cannot succeed in extricating the originality of the customs he is studying. This originality consists particularly in improving the prevailing elements. The primitive institutions of the Romans are formed around two principal elements, the authority of the father of the family and the narrow nationalism of the Quirites. Organizations of paternal and marital power take by analogy the form of dominical power; and the idea of "*dominium ex jure Quiritium*" dominates the patrimonial organization. The depreciation under the Empire of these two ideas entailed the slow but continuous reconstruction of all institutions, by analogy with foreign forms.

In the Middle Ages, *fief*, *fealty* and *homage* formed the central institutions upon which secondary institutions were modeled. It may be said that the feudal period ends not on the day when all or the majority of feudal institutions disappeared, but the day when the feudal contract of *fief* ceases to be the analogous type of formation or deformation for the inferior juridical elements.

For the force of analogy acts as a deforming agent by modifying already existing institutions so as to give them the structure which predominates at a given moment. Thus in countries where the feudal organization entirely absorbs landed property, or where the principle "*no land without a lord*" rules, the idea of the *fief* obtrudes itself so forcibly upon the collective thought, that sometimes the idea of private and independent property is inconceivable, and when it does really exist, it must be clothed "*nolens volens*" in the feudal form.

The power of analogy takes the lead in the creation of new types. If, for example, a primitive people living

under the authority of a king, wishes to escape the tyranny of a single individual and to divide the power, it will nearly always employ the monarchical form with some modifications. It will create two petty monarchs with absolute but identical power, and accordingly both will be paralyzed. It will constitute a certain number of petty all-powerful sovereigns in a certain but limited domain. It will give these petty sovereigns only a temporary sovereignty and will make them succeed one another rapidly. Yet it is on the ancient kingdoms that the ancient republics were built up.

In every age, phenomena of the same nature may be verified in other respects. The analogous development of law has many traits of resemblance with the analogous development of language studied by linguists.

§ 3. *The Economic Factor.* To estimate even vaguely the importance of the economic rôle in the development of law and in the creation of institutions would demand a threefold efficiency in the historical, the juridical and the economic sciences. If one is not versed in political economy, one cannot even state the problem nor foresee the method which would give accurate results in this regard.

It is nevertheless certain that taken as a whole, this economic factor is of considerable importance. It is not less certain that economists have united "en masse" to study phenomena which are of very varied nature but converge toward a central point, the science of economics itself. For those who do not concern themselves with this convergence and do not study economic phenomena in their economic results, there would be no advantage in preserving this incongruous union intact. In order to utilize them in philosophy and in juridical history, it behooves us above all else to disassociate them and throw into relief their original character. Without claiming to conduct this operation to the definitive analysis which

would be fitting, one may nevertheless lay down the following classification of the forces to which the term economic has been applied by one side or the other:

1. Economic Psychology: the intellectual or sentimental phenomena which govern the acts of production or acquisition of certain things.

2. Economic Logic: A series of intellectual operations by which men seek to utilize any knowledge they may have of the economic mechanism in order to regulate according to their sentiments, the production, acquisition and consumption of things.

3. The intellectual adaptation of man to the physical nature of things, with a view to making the best of them.

4. Action of the physical properties of things upon human mentality: Influence of environment.

I: *Economic Psychology*. The science of economics — superior, perhaps, in this respect to juridical science — has striven to disengage from among the motives of human action the simplest and most general elements.

What do men seek? Pleasure. What do they try to avoid? Pain. What are the conditions of human existence? The gratification of a certain number of needs. To this gratification of primary needs, to the search for pleasure and to the dread of pain and of work, which is a sort of pain, it is necessary to add foresight: pleasure postponed till tomorrow, pain avoided tomorrow, gratification of the needs of tomorrow. Such are the elementary psychological ideas which can explain economic phenomena.

This psychological state leads man into contact with things. The physical nature of things predisposes them more or less to provide pleasure for man, to spare him pain and to satisfy his needs. This relationship between the material qualities of things and the economic psychology of mankind gives them economic qualities which are connected with the ideas of value, utility, wealth, and merchandise, which we refrain from defining here.

The contact between the two groups, the active and craving beings, on the one hand, and the passive and temptings things, on the other, determines from the start certain primary actions; namely, production, rapine, and exchange. Man who desires certain objects can only produce them — in the very broad meaning of the word — or wrest them by force from those who have produced them, or take them with their consent by giving them other objects.

These human acts repeated constantly through history are studied by widely differing methods which give to each school its originality. The attempt is made to disengage from these acts certain general laws to which each school attributes more or less importance and universality. Such are the following principles: "Man tries to procure for himself the maximum of pleasure with the least difficulty"; "The price varies in direct ratio to the demand and in inverse ratio to the supply"; and "The demand is a function of the price."

Accordingly, political economy, its syntheses and its laws, are of great importance in explaining the creation of institutions. Nevertheless, the economic psychology necessary to the understanding of the history and the philosophy of law is not absolutely merged in that of the economists.

(a) Of the courses of action men pursue in order to procure goods for themselves, economists study exchange above everything else, production, less, and rapine very little. This is easily understood since this plunder is for our civilizations an abnormal fact which must be suppressed and not directed. From the historical point of view, plunder is as important and as interesting a phenomenon as exchange or production.

(b) Political economy tries to obtain general explanations of certain phenomena. It may neglect the particular and accidental. It does not create psychology for its own

sake. It studies human cravings in their results and can do so quite as well by neglecting completely their inner nature and confining its attention to their exterior manifestations without attempting to explain them. On the other hand, if one seeks a philosophical explanation of the origin of institutions, the most fully analyzed ideas are more explanatory than most general ideas. So that the psychological syntheses that are sufficient for the economist require analysis in the philosophy of history.

Thus "interest" or the "desire to amass riches," an extremely general phenomenon which is at the base of law as of political economy, is not a true psychological principle, for according to the individuals and the classes it rests upon different intellectual bases.

From all time, men have struggled to obtain two classes of advantages:

(a) The keenest physical and intellectual pleasures for themselves or their own. They seek to procure for themselves certain objects which they desire in order to consume them or their fruits and derive from them all the agreeable sensations which such a consumption can evoke.

(b) The power which gives to the individual — aside from any pleasure of consumption — superiority over his fellows and allows him to make his will prevail.

The desire for consumption and the desire for power do not perform their functions to the same extent in the same spheres. Among the masses, desire for consumption predominates. It often plays an important part in revolutions. In struggles between aristocracies and between sovereigns or pretenders, desire of power is the stronger. The desire for consumption and the desire for power do not obey the same laws. The first diminishes progressively with the consumption itself or the acquisition of objects to consume and ends quickly with satiety. The desire for power rather increases with the acquisition of wealth and the power which results therefrom. It is a

more constant incentive to toil which never ends in satiety, seldom, perhaps, even in satisfaction. How many millionaires or even multi-millionaires labor desperately to increase their fortunes when they will never be able to spend them in pleasure of any kind. These are not generally the least economical or the least selfish. The desire for power does not bear simply upon economic values; religious matters, public office, possession of land, and commercial dealings are likewise its object.

The invention of money effected a great transformation in human psychology. It brought about a fusion of the idea of power and that of consumption. It is from the psychological point of view, the power of consumption. Money created avarice, an apparently enigmatical but a perfectly logical sentiment. Anyone who holds a franc in his hand has potential power over an unlimited number of objects. He can, in imagination, make a great many different uses of it, all of them realizable. But when he has given his franc in exchange for any object whatsoever, he no longer has at his disposition anything except this one object. Whatever may be the value of his purchase, whoever buys always loses in power, whoever sells, always gains in power. Likewise, old Cato was right in saying that the wise father of a family ought to sell much and buy little. Whoever buys exchanges a considerable amount of power for a little enjoyment. Thus is explained this attachment to all money, whatever its nature, the simple possession of which has been for a long time one of the sources of the most profound satisfaction to man.

II: *Economic Logic*. This term may be applied to the group of intellectual operations by which men seek to utilize knowledge of the economic mechanism in order to regulate according to their sentiments, the production, the exchange and the division of wealth. More simply, this is the application of economic theories to the organization of institutions.

Only very civilized countries possess large schools of economics which present complete systems of their science to which the lawmaker may go to get official advice. But in every epoch of history, there have existed among all classes, certain fragmentary, sometimes contradictory, economic beliefs born of incomplete and onesided observations and hence, often vicious. Although poorly grounded or poorly systematized, these beliefs none the less constitute true economic logic, perhaps all the more forceful for being simple. Thus the disapproval of objects of luxury, a popular sentiment very widespread in every epoch, the fact of seeing in land or in ready money the only true wealth, the conception that the earth alone is productive, that money cannot produce interest since it does not multiply by itself, and so many other old principles that are to be found everywhere, constitute true economic theories. Their influence, sometimes fortunate, sometimes deplorable, upon institutions and customs, has been continuous.

In every age, peasants have often been seen to refuse to admit peddlers into villages and to hinder them in their trade as much as possible. They bring products which may be very useful, but they carry away money. Others leave money but carry away merchandise and they are also looked at askance. Contradictory but very forceful ideas; germs of theories on the nature of wealth which develop constitute sciences, but which have been very efficacious even in very rudimentary forms. It is by a sort of economic logic that in the Middle Ages many lords were willing to forego numerous pecuniary rights which would have filled their chests, in order to attract to themselves merchants and husbandmen, thereby greatly enhancing the value of their land.

Economic psychology and economic logic are two forces of a different nature which may under certain circumstances act in opposite directions. One is made up

of natural and general phenomena, often unpremeditated, almost unconscious; the other is scientific or pseudo-scientific intellectual labor, the result of more or less well formed observations, and of more or less well-conducted reflections. Likewise, it is not seldom that the theorist fails to understand exactly the mentality of the economic man and thwarts his tendencies. In his turn, the economic man often seeks to enslave logic by inventing theories with the sole aim of satisfying personal interests or the interests of a group. The doctrines of protection and free-trade and their constant struggle in the politics of all countries are explained much more by pecuniary than by scholastic rivalry. This accidental subjection does not prevent economic logic from pursuing its individual career and from making a large personal contribution to every legal system.

III: *Intellectual Adaptation of Man to the Nature of Things.*

(1) *Nature of Things and Economic Aims.* Men who desire certain things to gratify their desire of pleasure or of power are, through that very desire, obliged to conform to the nature of these things in order to make them prosper. They have to water plants which might not be able to endure drought, prepare the ground for seed, plant seed, graft vines and fruit trees, choose, care for and breed the live-stock which can live upon their lands, and so on. To do this, it is necessary to study the nature of these various things. It is sometimes necessary for the authority in power, whatever it be, to make laws and regulations to compel individuals to take into consideration to a certain extent the physical properties of material objects, and the physiological properties of living creatures, that are objects of wealth.

This knowledge of the nature of things, be it understood, is extremely variable. Accordingly, laws are adapted to it more or less successfully. In order to be

able to discover a satisfactory solution in every instance, the legislator would have to know all technics thoroughly, which is an evident impossibility. Besides, as every technic is constantly progressing, the truth of today may not be that of tomorrow, and some regulation or legislative measure which is in perfect conformity with the truth today might be rendered harmful and tyrannical by fresh progress of science.

This adaptation of laws to the nature of things is therefore always imperfect. This is manifested in all civilizations by more or less violent actions and reactions. There are proved to be periods of intervention when the law, custom or regulations try to influence the individual with a view to assuring the maximum of prosperity to the whole, and periods when the individual rids himself of all his shackles and announces that he is in the best position to know how he should strengthen the various elements of his patrimony.

In this expression *nature of things*, of what *nature* do we mean to speak?

1. Nature. — It is a question of the physical nature of inanimate things, of the physiological nature of animate beings, and of the psychological nature of certain animate beings. The psychological characteristics of the higher animals play a part in their breeding and in the nature of the work that may be required of them. While admitting that he no longer does so, especially must it not be forgotten that man has played the part of a thing. The degree of intelligence of the slaves of any particular race affected their value and their situation to a considerable extent.

2. Things. — The question here is more particularly of material things which can secure benefit to man. It is proper, however, to make a twofold observation.

(a) Man has had to learn to understand not only the things he likes in order to make them prosper, but things

that are obstructive and injurious, in order to overcome or suppress them. Obstructive things, those which threaten to deprive him of the benefits he expects, such as diseases of plants and of livestock, or noxious weeds which choke the seed; injurious things, those which attack his person directly and can destroy him, such as human enemies, ferocious beasts, venomous reptiles, or sickness.

(b) There are immaterial entities which impose themselves not only upon reasoning humanity but upon active and practical humanity; such are time and space. It is very necessary to treat them as positive things, whatever may be their philosophical nature. Although it is customary to consider these two ideas as related, they are not perhaps, from the economic point of view, of the same nature.

Space or economic distance may be regarded strictly as a material thing, for it is made up of the agglomeration of a certain number of physical bodies between two determined points. It is a certain mass of air, water and land which has to be traversed in order to go from one town to another, and the nature of the bodies to be found in this mass is of the greatest importance to transportation. Means of communication are established according to purely physical considerations.

Time may be measured materially by the displacement of bodies; but it is in itself absolutely immaterial. It flows just the same for him who measures and for him who does not measure it. This is a considerable difference, for man has more hold on space than he has on time. Time and space are obstacles to man. The good things he covets are not within arm's reach. He must tire himself by going to get them or pay to have them brought to him. Time is an obstacle. He who has sown his field has to wait for the harvest and if he has nothing to live off until the next crop, he will not have any benefit from his labor.

But time and space are blessings to man, the most precious blessings. For what use would the accumulation of wealth be to one who would have but a few moments in which to spend it? The time which slips away between birth and death, — this is life; and these years accorded to each individual, are they not the most precious thing which he possesses? The benefits he has been able to enjoy are secondary; the documents entered to his credit count very little to him who has not the time to utilize their value. Such reflections will seem rather trite to those who are ignorant of the fact that economists and even jurists always think of time as an obstacle and seldom of time as a value.

Space is also a form of wealth or at least a condition of all wealth. Landed property is valued by its physical nature but likewise by the space it occupies. Space makes it possible for man to enjoy great freedom of movements, to be able to be transported from one country to another. To travel in distant countries is a pleasure and therefore a form of wealth, a thing to be bought as any other good.

(2) *Nature of Things and Juridical Aims.* The legislator also observes the nature of things in order to realize juridical aims. It is then no longer a question of augmenting the elements of wealth. But since he has to assure certain juridical aims — security of transactions, preservation of the family patrimony, protection of the married woman or the minor, transmission of property, the guarantee of good faith in bargains — he is obliged in order to succeed, to comply with the nature of things. A great many of the distinctions that different legislations make between personal property and real property spring from the fact that the first is easily transportable and the second is not. The legislator also often distinguishes between fungible and non-fungible things, things which are consumed in the first use, and so on. He likewise takes

notice of time and space, in juridical organization. Thus in order to provide for the proper conduct of law-suits, he fixes periods which vary according to the distances involved, and so on.

IV: *Influence of Material Things upon Human Psychology.* The celebrated expression "historic materialism" might be extended to this whole class. Inversely with the preceding factors by which man acts upon matter, in this great category of economic factors, matter acts upon man. It constrains him, to a degree difficult to calculate, to follow some specific line of conduct, to modify in some way his moral and æsthetic values and his institutions. The famous school of historical materialism seized upon a very small branch in this immense group, without suspecting, moreover, that this immense group is only a very small thing, a very small brook in the immense river of historical life. It is none the less true that the very small historical force and the tremendous attention that has been attached to it both entirely deserve the recognition of historians, since they have drawn attention to the economic factor in general, hitherto misunderstood or put to wrong use.

(1) *Geographical Environment.* The influence of the geographical environment upon human customs and institutions has been noted for many years. The climate, altitude, proximity to the sea, and fertility of the soil undoubtedly influence the character of human beings as well as that of animals. It is often very amusing to make or to hear others make a series of simple and ingenious comparisons between the psychology of a race and the physical description of the country it inhabits or has traversed in the course of its history. Many works have been composed in this way which are very pleasant to read but which furnish results that are rather vague scientifically. It is very seldom that the author who indulges in this kind of literature does not allow himself

to be led on by his imagination and mingle the probable and improbable. That a country that is very poor and mountainous predisposes its inhabitants to a life of rapine to the prejudice of richer neighbors, this appears — even “a priori” — entirely natural. On the other hand, one would be very sceptical of an assertion such as: the spirit of classification among the Brahmins comes to them from the regular form of the peninsula of India. Between the two, the degree of probability of any specific comparison may vary “ad infinitum.”

The degree of pressure that environment exercises upon human character is far from being always the same. Some circumstances of a geographical nature may weigh heavily upon the individual and allow him no freedom of choice. Thus as regards climate, a very cold or a very warm climate may impede all civilization or necessitate a particular kind of life. But in a temperate climate and one of average fertility, man becomes much more independent of physical forces, and very diverse civilizations will be able to develop under the influence of very different factors.

In the calculation of the geographical factor, the following must still be taken into account:

(a) The state of civilization of the people subjected to it.

(b) The environment under which this people lived *previously*.

(c) The character and institutions of peoples living in analogous environments.

These various points of view have, it is true, sometimes been taken by writers; but, it seems to me, without any too much method or consecutiveness.

(2) *Demographic Environment*. The density of the population exercises a tremendous influence upon institutions. Those which are put in practice by a people few in number become absolutely impracticable when the

population increases. Large and small towns may be subjected to the same texts, and have the same codes. In reality, the law and the customs will never be identical. This demographic factor has been much more neglected than the preceding one. Henri F. Secrétan, in his "*La Population et les Mœurs*" is one of the authors who have been specially preoccupied with this question.

(3) *So-called Economic or Instrumental Environment.* By a rather singular phenomenon and one that is extremely important in history, inventions produced by the human brain pass rapidly from the passive rôle of created objects to the active rôle of creating beings. And what they create is man himself. Man who fashions a tool, at the very same instant in which he becomes master of this tool, becomes also its slave. He has to adapt his muscular and his intellectual efforts as well as his mode of life to the nature of this tool. But still more, his family life, his social organization, his sentiments, his thought, and his social or religious ideals will be more or less profoundly influenced by the creation of every new instrument which seems made solely to give him more power and to render his toil easier or his life more pleasant. So that the "*mens agitat molem*" has its counterpart, and man is obliged to live, love and think with a view to the best utilization of his instruments of labor. Such is, to my mind, the essential fact established by the materialistic theory of history.

What are the inventions which may exercise a tyrannical power over humanity? All or nearly all to varying degrees. (a) In the foremost rank may be placed all inventions affecting the art of war. Every military invention of any importance necessarily entails an upheaval of social conditions, internal as well as external. It is not necessary for them to be extraordinary inventions like that of gunpowder. Simple changes in tactics, the composition of the army, or longer, more patient and more systematic military training may assure the triumph of a

people and a political organization. The tactics of the first Germanic invasions, as well as of the later ones of the Saracens and of the Normans, the feudal army, the compact cavalry ranks, and the construction of fortified castles, constitute the various stages which resulted in the feudal system. The employment of even very rudimentary artillery could not but effect its disappearance. (b) Progress in the matter of instruments of production comes entirely in the second rank. For there is no possibility of production without security. Besides, the famous mills of Karl Marx and his schools — hand-mills, water-mills, and steam-mills — even taken symbolically, entail but very slight changes in history compared to those effected by military inventions. (c) Progress in means of transportation has transformed human intellectuality. It has not acted, as was for a long time believed, in the direction of the diffusion of ideas, of the mutual understanding and general unification of the human mentality — far from it. It has created new methods of grouping according to the way the systems of transportation have been planted, in certain countries destroying the life of the coast or outer regions to the advantage of the central regions, elsewhere acting quite the reverse. (d) Instruments of distraction. The printing press — the hand-press, the motor-press, the rotary-press — are just so many instruments which bear down on human thought with an insinuating but heavy tyranny. Periodicals, newspapers, great newspapers which issue millions of copies, rob the greater part of humanity of nearly all the time which is left it for reflection, outside of occupational labor.

This is not saying that our most modern newspapers are harmful. Perhaps they do more good than harm, perhaps they do only good and not harm. It matters little to us. We simply wish to establish the fact of the purely instrumental nature of the moral power of the

press. In the service of the good or the evil cause, the rotary-press will give exactly the same product. It is enough to have at one's disposal a certain number of these machines, and a certain sum of money in order to set them in motion, and one can introduce into the intelligence of the masses anything one wishes, for the masses have just the time necessary to adopt certain opinions, but not enough time to reflect and criticize.

The earliest printers wished to place at the service of thought an instrument of diffusion which could render it accessible to every intelligence; they wished to communicate to all the great masterpieces of human genius. Theirs was a great mission; and with great labor and small gain they were able to fulfill it. They scarcely suspected that by the nature of things the instrument which they created would become stronger than thought, that their work of intellectual liberation could become transformed into work of intellectual enslavement, and that some centuries after their death, any illiterate creature, provided he were rich enough, would be a thousand times more capable of influencing the human mentality than the Bible, Homer, Plato, Aristotle and all the classics combined.

Every time man tries to make an effort to realize a given ideal, he creates a new instrument; and by the single fact that he has created a new instrument, he has created a power which not only will not act solely in the direction of his original idea, but will impose upon him a new ideal. Matter created by man is stronger than man, because it transforms man.

§ 4. *Theory and Practice.* In a well established science, there could be no contrast — still less contradiction — between theory and practice. For practice is nothing else than the application of theory to real life. There is a possibility that this application will present numerous difficulties and, for various reasons, will not be car-

ried out with rigorous exactitude; but the application will be all the more perfect the nearer it is related to the theory. If, on the contrary, there is absolute disagreement between the two, it follows necessarily that one or the other is totally defective.

In the juridical discipline, this is not at all the case. For what is called practice is quite another thing from the application of theory to real life. It is, on the contrary, the art of borrowing from real life the reasons for and the means of escaping from the rigor of principles. Thus juridical theory and juridical practice, entities of different origins, have nothing in common but the ground on which they meet for the purpose of combat, and they may be in opposition and in contradiction to one another.

Since, in juridical discipline, practice is something other than the application of theory, how can the two be defined and the relations between them stated precisely? No solid definition has been given by anyone. Usage remains. But just as impressions on coins become indistinct by the influence of time, so words have a tendency rather to become blurred than intensified in their original significance.

Above everything it must be observed that the qualifications "theoretical" and "practical" may be applied to certain juridical functions, and to certain juridical methods; two points of view that are absolutely independent. The theoretical function — that of the *jurisconsult* — studies the law in itself and extracts from it general solutions aside from any controversy between private persons. The practical function becomes active every time that a suit arises or whenever it is necessary to draw up a contract in order to prevent one. It is represented by the judge, the advocate, and the notary. But a theorist may employ a practical method by making economic interests prevail in the general interpretation of the law. Conversely, a practitioner may employ a strictly theoretical

method and completely neglect practical considerations. These two phenomena are very frequent in the course of history. Also it is proper to distinguish carefully in history between the relations of theory and practice in juridical functions and the same relations in juridical methods.

I: *Theoretic Functions and Practical Functions.* Juridical theory is more particularly represented by the law school, and one who teaches there all his life may be considered as the type of a theorist. He acquires his knowledge of law by study, reflection and criticism of the reflections of others. By the study of cases and judicial decisions, he may descend from the general to the particular; but he never knows the case in all its details, he never has a human being explain himself to him and recount to him with all the particulars the circumstances of his dispute. He can only know what the judge has retained and chosen, — a few fragments from a bulky record. Besides, he cares to deal with the particular only if he can extract from it a general formula.

The legislative function in itself is outside of theory as of practice, for it consists of a command and in principle to command is not to reason. But nearly always, as a matter of fact, the legislator is another theorist. The orders he gives constitute general rules, and these general rules are the consequence of political theories.

The practical function presents to us three important personages: the judge, the advocate, and the notary. Each influences in his way the spirit of the law of his time. Whoever studies a given legal system has above everything else to inform himself upon the rôle of each of these personages. It might be supposed that by virtue of his authority the judge has the largest share of influence upon the evolution of law. This is not always true. In certain judiciary organizations, there is no counsel or he plays only a very unimportant part. In others, on the contrary, it is he who performs the real juridical work;

he is often a shrewd psychologist, who discerns the strength and weakness of the judge and knows how he can be taken in. The notary, especially in times when writing is not wide-spread, can through his process of drawing up documents, introduce innovations that the judge will not dare contest. Thus in the western law of the Frankish period, the rôle of him who frames formulas is considerable. It is in feudal justice that the counsel in judicial proceedings first shows himself. He becomes very powerful in all courts of justice in the thirteenth and subsequent centuries.

The education of the practitioner has considerable influence upon his type of mind. There are some civilizations where he studies in no school but acquires his training by simple apprenticeship, frequenting court pleadings and working under the direction of an experienced practitioner. In other juridical environments, he is subjected to a theoretical training of longer or shorter duration; sometimes even — as the Rabbis of the Talmud — he remains a theorist throughout his whole life while exercising justice.

All these circumstances have an influence upon the atmosphere of juridical environment and affect the technic.

II: *Theoretical Methods and Practical Methods.* (1) *The apparent and the concealed method.* The method of the jurist is always, or at least nearly always, apparent. He bases his solutions upon real arguments which justify them, and he is as proud of the force of his arguments as of the neatness of his solutions. In rare instances, personal interests and religious or political opinions may make him uphold one thesis rather than another. But since he formulates general principles and since in the course of a life-time rôles may often be reversed, he runs the risk of seeing himself oppose tomorrow his opinion of the day before. This situation is not exceedingly rare in

history. And, although rather disagreeable for one who wishes to be taken seriously, it is not fatal.

Quite different is the situation of the judge, who is never obliged to state the real motives of his decision. If he should make a rule that he would never decide between contending parties except according to the length of their noses, it would always be easy for him to render judgments whose reasonings were perfectly correct according to law and absolutely unassailable, and no one could ever suspect him of the true motive which caused his decision. So that it has been possible to term the style of judicial opinions *cryptological*, through the fact that it conceals the thought of the judge instead of revealing it. It is said that the judgment is often reached — sometimes even announced — before it has assumed its final form, and that the flood of arguments and authorities which would uphold it if attacked, were accordingly not known by the judge at the time of his decision. As a matter of fact that may happen. The true method of a jurist is nearly always apparent; the true method of judicial decision is sometimes apparent, sometimes concealed.

(2) *The Methods Explained.* The two methods, theoretical and practical, may be used indifferently by theorists or practitioners. But in what do the methods themselves consist? The first employs, in the solution of juridical difficulties, abstract technic, arguments from texts, from analogy or construction, in a word the whole of logic. The practical method neglects texts which have not foreseen the exact difficulty and any course of doctrinal argument which can solve it only in an artificial manner, and attempts to calculate the moral and economic advantages of every solution.

Suppose it is a suit between a farmer and a merchant apropos of a sale. The judge may shut himself up in his office, pore over texts, compare them, and seek what solution is most in accord with the general principles of

sale; in this case he will use the theoretic method. If, on the other hand, he analyzes and weighs the interests of agriculture and commerce, and if he wishes to favor in his judgment farmers or merchants, he will have employed a practical method.

The two methods may give identical results in a particular case and be in absolute contradiction in another case. Besides it is not often that a single theoretical solution is opposed to a single practical solution. Thus in our hypothesis, our farmer will advance a textual argument and the interests of agriculture, our merchant an argument from analogy or construction, and the interests of commerce, so that nearly always theory conflicts with theory and practice with practice as well as practice with theory.

(3) *Fact and Law*. In a given suit, what are the questions of law and what the questions of fact? Between these two ideas is there no logical contrast, as there is between the general and the particular, the essential and the accidental, the concrete and the abstract?

The question of law is that which has already been decided by the legislator; the question of fact is that which the legislator has not believed it opportune to regulate and leaves to the free evaluation of the judge. There is no difference in nature.

Suppose a horse that has been bought develops a certain disease after a certain interval of time. The purchaser claims not to have seen the defect at the time of the sale. He asks the judge to have his money returned, he being ready to return the animal.

1. First hypothesis. Suppose there has been an original rule of law which contains but a single mention of the subject worded thus: "If the judge considers a sale dishonest, he can pronounce it void." In such a case, the question of law resolves itself into practically nothing, whereas a multitude of questions of fact can be raised.

2. Second hypothesis. The code of the country is a little more explicit and says, for example: "The vendor is bound by an implied warranty against defects concealed in the thing sold which render it unfit for the use to which it is destined." The proportion of law has considerably increased, the proportion of fact sensibly diminished, although remaining always very important. The judge will always have to decide whether the disease in question is a hidden defect, whether it renders the horse unfit for a particular use, what is the use for which the horse was destined, and so on.

3. Third hypothesis. The legislator has drawn up a specific table of the diseases for which the sale must be annulled. The judge sees his power reduced, he no longer has anything to do but to determine the fact that the disease existed at the time of the sale — question of fact — and that it is embraced in the nomenclature of the legislator — question of law.

4. Fourth hypothesis. The legislator might go farther still. The existence of the disease at the time of the sale might be fixed by legal presumptions — the fact presumed after a certain date. Or even, for the fact, the judge might be obliged to refer to an expert, to the testimony of two witnesses, or to the word of one of the parties. In this last hypothesis, the law will have almost completely absorbed the fact.

In our days, it would be unusual to see the judiciary power so completely bound. In a great many ancient systems, the judge may sometimes choose the method of proof but has not the power to appraise it. If a certain number of fellow jurors or witnesses come to take an oath or make a deposition before him in the prescribed form, he is bound to believe them whatever may be his private conviction.

A precise distinction between the fact and the law can be made with the maximum of precision only when the

judiciary and legislative functions are distinctly separate. When there is a confusion of the two powers, the line of demarcation is more difficult to trace.

(4) *The Ideal of Justice in Theory and in Practice.* The idea of the just is a theoretical idea. Its basis is undoubtedly metaphysical, for it is through metaphysical conception that we attribute to the "suum cuique" an ideal character. But the value of the just once admitted, pure logic permits of the development of its characteristics, and of its application to any hypothesis whatsoever. Like every problem of pure logic, problems of justice may be more or less complex and consequently more or less difficult to solve. Actual, concrete life will state a series of these problems, and it will be necessary to study it in order to gather their data. But the necessary data once known, a purely intellectual operation will furnish the solution.

The "suum cuique" is only one factor of law in the midst of many others. No legal system ignores it, but none applies it constantly. Its introduction into law may be effected at various moments:

(a) At the moment the law is made. The legislator may ask himself if the orders that he gives conform to equity. He thus performs an act of justice by protecting the patrimony of minors, of married women and of lunatics, by assuring equal rights of succession to all the children, and so on.

(b) Equity may also be considered at the time contracts are made. Contracts are laws which individuals impose upon themselves. Made fairly, they may introduce into the private life of each more justice than the legislator could. Thus the legislator may have outlined a type of matrimonial relationship, just in the majority of cases, if the fortunes of the couple are equal or in a certain proportion; but unjust if there is too great an inequality. The marriage contract

will allow greater equity to be obtained in each particular case.

(c) Finally, justice may be taken into consideration at the time when the interests first conflict. A contract, even a fair one, may end in circumstances which result wrongly. Even a law drawn up with the utmost scrupulousness and desire of justice may likewise in certain instances sanction wrongs. Will the judge or will he not be able to correct the law and the contract? If not, there will be justice at the beginning of the juridical relation, but it will no longer be found at the end. If the judge can correct the law, the converse will be true. The two conceptions have their advantages and disadvantages; accordingly we see legal systems where one or the other predominates. The justice of the law is schematic, general, theoretic; justice left entirely to the judge's evaluation can better follow the contours of life and give more entirely exact individual results; that is, if we admit the possibility of its being absolutely impartial.

(5) *Double conflict of theory and practice.* When one assails theoretic work in law, a double reproach is made against it:

(a) "That it neglects reasons of practical utility, and sacrifices the substance to the form, and the prosperity of individuals and of the nation, in order to obey the dead letter of an old text. For a theorist, men are made for the law, not the law for men. Before making laws upon the economic, the industrial, and the commercial life of men, it should be necessary to be acquainted with this life, and very often the one who frames the law is not acquainted with it. He is ignorant of the needs of his times and applies to them obsolete rules." And so on. To sum up, theorists and practitioners have an old battle-ground, — the respective importance of juridical and economic factors in the framing and the interpretation of the law. It must be remarked that the principles of jus-

tice are classed sometimes in one group, sometimes in another. For true business-men and certain moralists justice is nothing but theory and they disdain it completely; more sentimental reformers make a certain place for it in practice.

(b) "The theorist solves in advance a multitude of questions which it would be much better to solve at the moment they present themselves in reality. It would be very much better for the judge to be untrammelled by any text, for him even to be ignorant of juridical science. A good conscience and a little common-sense would be sufficient to decide any suit. The more liberty the judge has and the freer he is from juridical prejudices, the better able he will be to discover the most useful and the most equitable solution. True practical law should not be created under a general form before the conflicts arise, but by special decisions at the time they are to be solved."

We do not at all intend to pronounce upon these two great tendencies of the juridical mind. Theorists and practitioners have had in different civilizations their favorite spheres and their periods of prestige. They are both right to a certain extent.

Theoretical systems are preferable from the point of view of the social order and security of transactions. With them, one knows what is to be expected, or at least, about what is to be expected. Even were they defective, principles that are immutable and derived by a more or less rigorous logic may spare the individual many surprises. On the other hand, they may be troublesome and hinder more or less social progress. Practical systems permit of greater perfection in juridical relations from the point of view of the useful and the just. They are extremely dangerous as regards the security of business transactions and, besides, are conducive to arbitrariness on the part of the judge.

These advantages and these disadvantages, which have

been well understood for a long time, prevent juridical systems from becoming definitively fixed in any determined direction.

The extremes of a situation — absolute submission of the judge to a pre-existing text and his absolute independence at the time of the suit — seldom, one may say never, present themselves. In reality, the judge may, by subtle interpretations of the text, or by inexact appraisements of the fact, always extricate himself from the restraint of the law. Only, if the prestige of the doctrine is great, he will not do it except under particularly pressing circumstances.

On the other hand, habitual unadulterated arbitrariness has never existed. When the law lays down no rule for the magistrate, he is obliged to invent one for himself. Even for acts which depend upon his own free will, every functionary maps out for himself a line of conduct which he generally follows without being obliged to do so. Experience shows that in every domain precedents assume for themselves the authority of veritable laws. If the functionary keeps the motives of his decisions hidden, the law exists none the less for that, but it is occult; if he reveals them — and he will do so sooner or later — this is equitable law coming to take the place of a missing civil law.

III: *Theory and Practice in the History of Law.* The relative strength of theory and practice at any given moment in the life of positive law is of great interest. It is one of the features by which the juridical systems of various peoples assert most clearly their individuality. From this particular point of view, no civilization is like another and although certain institutional evolutions are monotonous and commonplace, this side of juridical technique appears in each country under new and original forms.

If one wishes to estimate the value of the theoretical or the practical character of an environment, it is well to

observe the distinctions we have just made between the functions and the method, and in the method, the three principal characteristics, — of legality, of equity, and of economic utility.

The regulation of urban servitudes in various legal systems may furnish a suitable enough example for the purpose of making a comparison of the differences in technic.

(1) *Urban servitudes in Roman Law.* It is strange that the Roman law, so deeply studied in so many respects, still remains very enigmatical in certain elements of its technic. It cannot be denied that its general theory of predial servitudes is essentially deductive; the general rule that the servitude can exist only as a burden on land and for the benefit of land — of which the rule “*servitus in faciendo consistere nequit*” is one of the aspects — can be presented only as the logical consequence of a previously stated definition. We know that practice cannot uphold it in its entirety. The necessity of a “*causa perpetua*” which prevents the creation of a right to draw water from a cistern, the indivisibility which prevents one of the joint owners (of a piece of landed property) from acquiring a right of passage to his sole advantage, — all of these ideas are evidently of theoretical inspiration.

Neither primitive formalism, nor the spirit of conservatism, nor native nationalism, nor the particularities of the judiciary organization or procedure, — can in any way explain the general spirit which dominates the whole of the theory of Roman predial servitudes. The influence, still but slightly understood, of a philosophical education upon the thought and the method of the Roman juriconsult alone can furnish a clear explanation. Roman theory will never be completely emancipated from the rules that were imposed upon it at his beginning; but the practical sense never loses its claims and corrects certain theoretical excesses of the early time. Paulus gives us an ex-

ample of this: "The servitude of drawing or using water except from its source or fountain head cannot be granted; nevertheless today it is the custom for it to be granted from any place whatsoever."

(2) *Urban servitudes in the Mussulman Law.* The Mussulman jurisconsults — at least certain of the most popular among them — have been represented as the precursors of the theorists of the "misuse of rights." That is true up to a certain point. In view of the existence of but a single sacred text, which is very incomplete from the juridical point of view, but very rich in precepts of morality and equity, it is to these precepts that they were obliged by preference to apply in order to fill up the gaps in the law. So, when in many legal systems customary traditions or the authority of a sovereign imposes special and precise limitations upon the law of property, the Mussulman jurisconsults were obliged to work out these special limitations by the aid of general principles. It is not surprising that they asked themselves at a very early period, "May one use his rights, not for personal advantage but in order to harm others?" "May one do anything he pleases in his home, at the risk of inflicting unendurable injury upon his neighbor?" It is evident that these questions cannot be answered unreservedly in the affirmative, and that in order to govern the relations between neighbors and render town life somewhat endurable, the exercise of urban property rights must be regulated.

The Mussulman jurisconsults did not go farther in the limitation of property rights than have other peoples. They followed different directions and different methods. Since the free life of plains and fields preceded the restricted life of towns, it is evident that the contact took place among family groups who were in the habit of doing in their homes whatever they pleased without inconveniencing any one or being inconvenienced by any-

one. City life brought up multiple neighborhood conflicts for which "each is master of his own" formed the common law, and "provided the life in common is not rendered impossible" served to justify indispensable limitations.

The inhabitant of a city is in danger of being deprived of light, sunshine and fresh air; he may be deprived of the intimacy of his family life by the fact that the neighbors can look in upon him. What is more unbearable? For the Mussulman, the family life is, without hesitation, everything. He will give up air, light and sunshine, provided the privacy of his home remains closed against all intrusion. The Byzantine of the Middle Ages, on the contrary, attaches importance to the view. The view of the sea is especially sacred to him; but the view of mountains, gardens, public buildings, and public paintings are advantages of which no one ought to have the power to deprive those who enjoy them. On the other hand, it is all the same to him that the neighbors can look into his home. It can only be lovers of lawsuits or odd beings who could trouble themselves about it, and such persons should locate themselves so that they can escape the eyes of the public.

The solutions of Ibn el Qasem and Harmenopulos symbolize perfectly the interior life and the exterior life of a home. They have had a tremendous influence in architecture and have created two important types of residence: interior construction, and exterior construction. The Mussulman peoples have not been the only ones to profit by the first type. The splendid "patios" so numerous in the large cities of South America are a product of it; the barred houses of these cities have always taken care to assure the intimacy of every household. Thus through the centuries the beneficent influence of the Mussulman jurist has been able to perpetuate itself. But it is evident that it was necessary to choose between the

two types of town houses, and that juridically the sacrifice made by the owners to the exigencies of life in common is equally important in both solutions.

(3) *Urban servitudes in the law of the Talmud*. The Talmudic rabbis have incomparable school traditions and methods of academic teaching. Their juridical education is long and difficult; the pupil repeats his teacher's opinions a long time before he dares to profess any of his own. The text which has been directly revealed by the Deity and must be respected in its smallest details is relatively voluminous; the symbolical interpretation is added to the literal and positive interpretation of the Bible and renders all the more complex the casuistico-exegetical method which characterizes this discipline.

It seems that the great rabbis wished to create only teachers, and not crowds of scholars with insufficient instruction. Thus — at least in the classic periods — they could produce only very profound works. They had not the art, always understood by the Romans, of summarizing and making slight treatises within the reach of all.

The Hebraic juridical classifications are also as inconvenient as the Roman are convenient. The Talmud is a work where one digression involves another, and however pleasant they may be, the order and the development of the ideas is none the less disturbed thereby.

The nationalism which had become more narrow through defeat and persecution also prevented the Talmudists from rendering to humanity the great services of which they would have been capable. The rabbis of the Talmud did not ignore practice; they were very determined characters, and in the complexity of their argumentation the very positive grounds of certain rulings may be distinguished. And this reasoning may be very elegant from a juridical point of view.

Primus lives upon a ground-floor of which he is undoubtedly the owner. Above him, the first floor belongs

to Secundus. The house has settled down in such a way that the door of the ground-floor is almost entirely obstructed and the proprietor has difficulty in going in and out of his home. He goes to the owner of the first floor and this dialogue ensues: Primus: "The house will fall down if we do not have it repaired." Secundus: "I am getting along very well; I do not wish to go to any expense. As for you, if your door is too low, crawl upon your stomach to go into your house and crawl upon your stomach to go out of your house." Primus: "I will repair the whole house at my expense." Secundus: "But where shall I live in the meantime?" Primus: "I will provide you with lodgings." Secundus: "No, I do not want to be inconvenienced. Crawl on your stomach to go into your home and crawl on your stomach to go out of your home." And Secundus is within his right. A very rigorous solution. But a "but" of a juridical nature corrects the rigor of the juridical principle. If the property has sunk down, the first floor no longer occupies the same situation in space that it formerly occupied; it has dropped into the space which belonged to the owner of the ground-floor. The recalcitrant is no longer in his own home, he is no longer the owner, he can no longer show himself unwilling to come to terms, and everything is thus settled.

(4) *Other combinations of theory and practice.* The examples we have just given are mere examples; their aim is to explain and not to prove. We have no intention of pursuing this examination through all the legal systems that are accessible to us. We should thereby only establish the fact that the ways of combining theory and practice are manifold. No doubt theory often imposes unjustified solutions and in certain respects it may be termed tyrannical. Doctrines that are too subtle and inaccessible favor the exploitation of the masses by a group of scholars, or pretended scholars. They produce unrest in juridical

life. Doctrines that are sufficiently clear and simple bring security and precision to the business world. The reception accorded the Justinian compilations in the course of the Middle Ages was extremely varied according to the time and country. In societies developed enough to recognize themselves in them, they produced order and justice; in those incapable of disengaging what pertained to them from this mass of texts, they were considered pretexts for chicanery. Some centuries were necessary to adapt them completely to the conditions of practical life.

As regards servitudes, it was only in the fifteenth century that Caepolla wrote his famous work, a model of its kind. This great personage did not disdain to examine all the details of domestic life and to study in detail, for example, the construction of a sink. Simply by making strict application of the Roman texts, he could obtain thereby reasonable, if not always perfect, solutions. For centuries many towns recognized this treatise as the juridical code of principles. It is true that certain regions of local customary law, at the same time, were fashioning still more satisfactory institutions for the regulation of neighborhood relations. Such is the law of "party right," so advantageous from the practical point of view but rather poorly defined as to its juridical form. The Civil French Code has inherited Roman law and customary law conceptions. One of its earliest commentators, Pardessus, knew and made use of Caepolla. His "*Traité des Servitudes*," however, does not excel by reason of practical considerations. It has lost — along with many others — the "*raison d'être*" of articles 678 and 679 (former article 202 of the Custom of Paris) of the said Civil Code and gives a very extraordinary explanation of them. Is it not a rather curious phenomenon, that of having lost for a long time the practical reason of a rule based solely upon considerations of practical utility?

(5) *Modern treatises.* In our times, two currents of ideas, both interesting, bring back into question the relation between theory and practice. The thesis "misuse of law" or "misuse of rights" in France, and the thesis "free law" in Germany, without being identical, have an equal tendency to reduce the rôle of theory. We do not have to decide how well grounded they are. Historically, they express the perpetual oscillation between the need of order and stability, and the need of progress in the paths of the useful and the equitable.

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BOOK III
DETERMINISM

CHAPTER I

DETERMINISM AND THE IDEA OF LAW

§ 1. DETERMINISM AND THE IDEA OF A LAW: (I) DETERMINISM AND DETERMINATION; (II) THE IDEA OF LAW IN THE UNIVERSE.—§ 2. DETERMINISM AND THE IDEA OF A LAW IN THE FORMATION OF THE LAW: (I) RENEWAL OF THE HUMAN PERSONNEL; (II) MULTIPLICITY OF THE CREATIVE FACTOR IN LAW; (III) RATIONAL LAWS OF REALIZATION; (IV) METAPHORICAL LAWS OR FORMULAS.

§ 1. *Determinism and the Idea of Law.*¹ The following definition of determinism has been given: "The doctrine according to which every phenomenon is determined by the circumstances in which it is produced, so that a state of things being given, the state of things which follows it is a necessary result." (Goblot, *Vocabulaire philosophique*.)

Thus defined, determinism is not distinguished from the doctrine of causality. It does not affirm the existence of any repetitions of the same phenomena nor accordingly of any kind of laws. It does not deny the existence of chance and only vaguely denies human freedom. Neither do deterministic philosophers restrict themselves to the development of this formula. They have added to it many other affirmations which are not its necessary consequence. In order to give an idea of their doctrines, Goblot was obliged to add the following: . . . "Determinists speak only of an *immanent* necessity, which is confused with nature. Determinism is nothing other than the principle of the universality of natural laws;

¹[In this Chapter, the word "law," not capitalized, represents the author's word "loi," here used by him in the sense of "any general rule of phenomena," not specifically juridical law. — Ed.]

there is no contingency, no chance; or again, there is in nature no first cause nor absolute commencement."

In fact, the deterministic spirit goes much further; it affirms that in all domains natural laws are logically and practically within the scope of human knowledge. It even dares to claim to understand some of them already, and formulates certain maxims in history which have claims to generality and even to universality.

Moreover, like all words possessed of prestige, the word "determinism" is encountered to a certain extent everywhere with various and variable meanings. To reduce it to its etymological meaning would be to fail to understand its historical rôle. Without stopping to enter into a discussion of simple terminology, it is perhaps preferable to make a rapid analysis of the principal ideas for which it has served as a label but which are far from always being in perfect accord with it.

These ideas may be traced back to two elements: (a) The affirmation of a general *determination* which dispels certain ancient forms of human belief. (b) The attempt to utilize this determination for the purpose of enlarging human knowledge through the idea of *law*.

I: *Determinism and Determination*. Determinism in its present-day form states as its first principle the strict and universal necessity of all phenomena of the past, the present, and the future, which cannot be produced otherwise than exactly as they have been produced, are produced, or will be produced. Everything is equally determined with the same strictness. No determinist will contest this principle. But human psychology would get along quite as well with a more fluctuating determination and one which would allow necessity to play with reality as a cat with a mouse. She would always end in the long run by crushing it forcibly in her teeth, but might amuse herself by allowing it to run to right and left. This popular conception of determinism, formerly rather

wide-spread, is not perhaps absolutely foreign to certain modern savants who, unconsciously, do not always attribute the same degree of determination to all phenomena.

Determination being considered universal is as rigorous among animate as among inanimate beings. It is evidently less easily grasped in the former case, but if the principle is admitted, it cannot be less rigorous there than elsewhere.

It is eternal, because there is no reason for its intervention at one moment and not at another. Thus all the phenomena of the past, the present, and the future have been eternally given and would have been eternally known by an omniscient intelligence.

This philosophical explanation of the universe evidently passes beyond the bounds of experience and plunges into the metaphysical. Undoubtedly, the multiple determinations established by experience have contributed much toward spreading the belief in universal determination. But thus generalized, it has need of a new basis which can only be of a logical and metaphysical nature.

Now, metaphysically and logically, universal determination may be presented under three aspects:

(a) Under a transcendental form. A supreme creative will of the world would have fixed destinies from all eternity. The birth of every living being, the details of its existence, and the course of history, being manifestations of the divine will, would have their "*raison d'être*" in this will. The concatenation of phenomena would only be the appearance of universal necessity. Such is fatalism or religious determinism.

(b) Under a pantheistic or immanent form. It is here expression of nature and of the destinies of the universe merged with divinity itself. The world, self-creative, develops from within toward certain unknown directions, and universal necessity results from the realization of the world just as it must be realized. Here again, the

succession of phenomena does not reveal to us the true reason for which they were produced and could not have been produced otherwise.

(c) Under a purely causal form. A given state of things is explained completely and solely by a former state of things, and must of necessity produce a particular state of things, subsequently. Determinism is therefore simply the concatenation of causes and effects without the direction of any hidden or superior force. Universal necessity is the sum total of the phenomena in this succession.

Causal determinism alone can be said to be scientific determinism, not because it constitutes a scientifically established philosophical doctrine, but because it is the hypothesis necessary to the establishment of science. In so far as they are theories, the three are equally metaphysical, that is to say, hypothetical. For however opposed they may appear, they have mutually influenced one another to a considerable extent in the course of philosophic history.

Scientific determinism implies that the concatenation of causes and effects explains everything that is taking place, that has taken place or that will take place in this world. Consequently, it denies miracles and psychological freedom.

(1) *Miracles*. A miracle is the intervention at any moment whatsoever in the history of the universe of a higher power, which modifies however slightly particular phenomena which should be produced naturally. It is, therefore, if the expression is preferred, the participation of the supernatural in existence. Originally inclined to explain everything by the intervention of superior forces, man has perceived, in proportion and according to his scientific development, that the most impressive and the most extraordinary phenomena could be traced back to rather simple causes. By a generalization quite compre-

hensible but imperfect from the view-point of pure logic, a great many minds have long since concluded that a miracle is an impossibility.

Some savants have even gone further and tried to explain everything not by the concatenation of causes and effects as they exist, but by the causes as they know them, and have denied facts which seem to them inexplicable. Thus the facts of hypnotism were for a long time formally disputed in the name of a wrongly understood determinism. Nowadays nobody would any longer commit such an error. No one would deny any fact because it was mysterious, disconcerting or incomprehensible. It can be doubted only in so far as it is not established with certainty.

(2) *Freedom.* For the determinist, the indeterminate intervention which could not emanate from a superior power, could also not spring from the living being, nor from the living and reasonable being. The living being is caught in the chain of causes and effects of which it is a link like any other. Its action depends upon the totality of the springs and motives which press upon it and constrain it to do what it does and not something else.

Experience shows that the higher animal, man, is on the whole, of an extremely docile mentality and that, except when a Hamlet is encountered, it is easier to play upon the human brain than upon the flute. But that proves no great thing; it is perhaps only an illusion. We do not know what takes place in the depths of the mind. In the humblest docility, there may be an element of freedom. A revelation of the motives, the reasons, and the cerebral constitution of a human being would not explain the act of decision, the mechanism of which is unknown to us.

But precisely because the mechanism is unknown, the will is not an element of positive psychology. Since the phenomena of thought are only partially known, the idea

of freedom may legitimately represent this portion of the life, the individuality, and the subjectivity which is unknown to us and which perforce intervenes in existence with the same right as the known elements.

Absolute miracles and an absolute freedom would destroy universal determination; but relative miracles and a freedom relative to our state of knowledge do it no violence and are even its logical consequence.

II: *The Idea of Law.* Suppose an omniscient intelligence placed at any moment whatsoever in the course of time. Having before its eyes the panorama of the universe and being able to compute all the series of combinations of causes and effects, it would see unrolled before its eyes "ad infinitum" the most detailed historical tableau. It would have a knowledge of universal realization. But the knowledge of universal realization presupposes the knowledge of universal causality. Now these two branches of the infinite knowledge which it is impossible for us to attain but quite possible to imagine and take as guide, do not merge into one another.

Universal causality is the totality of all the relations that all things and all combinations of things can have among themselves. Law is generally defined by the expression, "A constant relation between two things." But all relations are constant if the things are identical and placed in identical conditions. So that the word "law" signifies simply "relationship between two or more things," which leads back purely and simply to the idea of cause and effect.

One cannot know the exact mechanism of the action of things upon one another. Their distance apart and their mutual affinity are distinguishable, however. At a certain degree of separation, things are in ignorance of one another; the existence of the one is not modified by that of the other. On the other hand, certain things remain foreign to one another even when close together, because

there is no affinity between them; while contact between certain bodies quickly upsets the characteristics of both.

The knowledge of all the affinities which everything and every combination of things might have with all other things and combinations of things if they were brought into contact with one another, would be that of universal causality. The knowledge of the contacts which at any given instant of the universe could be effectively produced would be that of universal realization. The name "laws" has been given to the generalizations which permit the human intelligence to attain, in a certain measure, universal causality and universal realization. What are their logical values?

(1) *Hypothetical laws.* Every hypothetical law leads back to the form: "Given A, B is the necessary result." A is a complex idea and represents the bringing into contact of *a* and *b*. The law is hypothetical because it in nowise affirms that A will be realized or even could be realized. The frequency of realization in nowise affects the value of the law; it affirms the constancy of the affinity between *a* and *b* expressed by B. If the establishment of this affinity is correct, its generality is certain under two conditions which may moreover be considered as implied in the formula itself:

(a) In order that B be necessarily produced, the phenomenon A will have to be repeated under a form that is always absolutely identical. Its elements, *a* and *b*, and the method by which they are brought into contact, will have to be always the same. If their identity was not absolute, the reproduction of the phenomenon B could not be expected. This is why hypothetical laws, true in all domains, will be more difficult to establish in the domain of the moral and social sciences. For there it is very difficult to disengage ideas that are simple and always identical with themselves, and one runs the risk of contenting oneself with a mere verbal identity instead of

an identity of nature. The ideas, "property," "marriage" and "succession," for instance, may correspond to facts which bear little resemblance to one another. Accordingly, it will be necessary to exercise much prudence and make careful observations before defining what necessary relations may exist between a phenomenon of this kind and another juridical or an extra-juridical phenomenon.

(b) In order for B to be necessarily produced, A has to be isolated to a certain extent, or to put it differently, it must not encounter any obstacle. The intervention of another phenomenon might paralyze the affinity between *a* and *b* or modify its force. Obstacles may completely annul the affinity and entirely prevent its effect: thus water thrown upon powder might prevent its becoming ignited; or they may become united with the original phenomenon in such a way that an effect of combination will be produced which will more or less cancel the regular effect.

Several factors intervening simultaneously in the same phenomenon play the part of obstacles to one another and consequently render it difficult, sometimes even impossible, to calculate what the effect will be.

Hypothetical laws are infinite in number. For all things and all combinations of things would be in a certain relation if they came into contact with one another. But as many things will never come into contact with one another, these relations will not become realized and will always remain unknown.

Hypothetical laws are, therefore, possibilities and not realities.

(2) *Historical Laws, or Simple Laws of Realization.* The law of realization may be formulated thus: "At a particular moment A will necessarily be produced and will necessarily be followed by B." For an omniscient mind, there would exist in all domains an infinite number of

laws of this nature. This is an inevitable consequence of the principle of universal determination. In all domains where the human mind can compute all the affinities between things, and can isolate completely or almost completely, formed zones of influence protected from every obstacle, it is allowable to formulate laws of this nature. Astronomy is the most perfect type of science which comprises laws of realization.

There are, on the other hand, other domains where it would be absolutely absurd to attempt to effect a calculation of realization, through the fact that they are open to every obstacle of every nature. Thus, will a given psychological phenomenon become realized at a particular given moment? We know that the fact A always produces in the human spirit the impression B. We know that tomorrow at a particular hour the fact A will be produced before a certain individual; can we necessarily conclude from this that the impression B will be realized?

The phenomenon A becomes itself decomposed into two elements: (a) A human being in a certain psychological state, before whom a certain event must be produced; (b) An event which must present certain determined characteristics.

For it to be a certainty that the contact of *a* and *b* will produce B, there must be a certainty in regard to the identity of *a* and *b* as they are conceived in the law and of *a* and *b* as they will be produced. But the knowledge of this identity presupposes the knowledge of an infinite number of elements of every nature. For a certain psychological state presupposes a certain physiological state, which in its turn presupposes the realization of facts of a biological, a chemical, a physical, a meteorological, an astronomical, etc., order.

Let us admit that such a study is possible and that one may arrive at the certainty that the A which will be realized tomorrow is identical with the A contained in the

hypothetical law "A produces B," that is to say, that *a* and *b* will be identical in nature with what they should be and will come into contact at the desired moment: we cannot even then affirm that B will be realized, because phenomenon C intervening at the moment of contact, might annul or modify the result and give for example B'.

We conclude therefore: Every historical law or law of realization is based upon a hypothetical law or law of affinity. Every historical law and law of realization will be correct if it can establish: 1, Perfect identity of the elements realized or to be realized with the elements of the hypothetical law upon which it is based; 2, The impossibility of the intervention of an obstacle.

(3) *Combined Laws of Realizations.* When the conditions which we have just stated are realized — but only then — the human mind has passed from the knowledge of the affinities of things to the foresight of the realization of these things. It is now very fine to be able to affirm that a particular fact will be produced in a particular fashion, at a given moment, and that necessarily. But the certainty of the realization of an isolated fact would be of no great practical importance, and the law of realization simply necessitates an independent calculation for each fact properly so-called.

It has been the ambition of the human race to attain more surely and to penetrate more easily into the knowledge of the future. It has attempted to discover series of causes and effects which are capable of reproducing themselves indefinitely under the same forms in such a way that the establishment of one fact permits immediately of the foresight of a more or less considerable number of facts. Many scholars, especially in the domain of the social sciences, appeal and have appealed to laws of this kind, without however indicating their mechanism, or justifying their logical value.

We are going to point out a few of the forms of combined laws of realization, to which we are obliged to give a name.

1. Say A, decomposable into a and b , ought of necessity to produce B, decomposable into b and c , which in its turn ought of necessity to produce C, or c and d , which in its turn will produce D, or d and e , etc., down to Z. The knowledge of A alone will enable us to foresee the necessary realization of Z and of all the intermediate phenomena, provided, of course, that there is perfect identity of the causal elements and an absence of any obstacle.

2. It might be improved. If one believes that he has discovered that Z is equivalent to z and a , and ought to lead back to A a second time, which would lead back to B, which would lead back to C, etc., all the phenomena recreating one another alternately and regularly, we should thus have a sort of closed circuit, the indefinite repetition of which would permit us to foresee an indefinite number of phenomena.

3. Again one might imagine that Z is not equivalent to z and a , but to z' and a' and will give A', a phenomenon identical to A, but upon a higher order — that is to say, higher because of a precise and constant character, — A' will give B', which will give C', etc., and we shall thus have the spiral development dear to the hearts of some great thinkers.

4. The oscillatory movements, or alternate changes in opposite directions, are more complex in their mechanism; they presuppose the combination of several forces. Moreover, even when they are manifested in the same way, the oscillatory movements may be instigated by very diverse processes. The oscillation of the pendulum, due to force already acquired, has not the same "*raison d'être*" as the oscillation of the balance of a pendulum, which functions as the regulator of the force of the spring. One might ob-

tain a continual oscillatory movement between two points, A and B, by the transformation of the attractive force into a repulsive force, so that a body placed between the two would be attracted by B from the time it came into contact with A, and attracted by A as soon as it came into contact with B. This would perhaps not be very rare in the domain of psychology.

§ 2. *Determinism and the Idea of Law in the Formation of the Legal System.* The formation of the Law, like every historical fact, is predetermined by the totality of causes and effects. An omniscient intelligence might at any instant whatever foresee the indefinite unrolling of juridical phenomena as of any other phenomena. Man's ambition is to become this omniscient intelligence, but he is still far from attaining it. As a guiding point it is to be commended; but we must not be overconfident that we are approaching it. To measure the range of our means of knowledge is the first condition of progress.

It is certain that between various juridical phenomena or between juridical phenomena and certain extra-judicial phenomena, one may discover hypothetical laws which we should prefer to term relations of affinity. There are relations of this nature between certain forms of inheritance and certain matrimonial régimes. These relations of affinity, by virtue of which two juridical concepts being brought into contact will of necessity give a particular proved result — when no obstacle intervenes — are themselves infinite. With a view to the better understanding of history, it is well to note those which have been realized most frequently, without forgetting that frequency of realization cannot rob them of the hypothetical character which logic imposes upon them. But these hypothetical laws serve only to establish the relationship between cause and effect and lead back to causality.

As regards laws of realization, it is absolutely impossible to formulate them logically, for the double reason

that the identity of two social phenomena can be affirmed only approximately and that the bringing into contact is always liable to be crossed by obstacles. To be convinced of this, it is sufficient to consider in turn the incessant renewal of the human personnel, on the one hand, and, on the other hand, the multiplicity of the creative factors in the law which play the part of obstacles in regard to one another.

I: *Renewal of the Human Personnel.* The principle "Nothing is lost, nothing is created," true in the material and physical world, is false for animate bodies, and becomes more and more false according as one ascends in the world of thought. Death is incontestably a destruction, destruction of life, of individuality and of thought. This destruction is perhaps not absolute: materially, it may be said that the vital and intellectual force becomes decomposed into other modes of movement; spiritually, one may hope for a certain survival of the individual soul. But for the world wherein we live, for the world of thought, deceased beings have quite disappeared; their intellectual force is abruptly cut short. At every death, the world becomes a different world. "The earth was worse in this year," said an old French poet in deploring the death of another talented poet, and the expression was a well-chosen one.

Now death strikes each individual in an order completely impossible to be foreseen. By prolonging certain existences and destroying others prematurely, it creates the sphere in which alone every intellectual activity can be developed. New lives come continually to replace those which become extinct, but never resemble them in every particular. It is impossible to foresee these new beings. The laws of heredity are little known to us even among the simplest beings. The double play of birth and death produces thought at every moment in history. How could we subject this world, the causes of which are

totally inaccessible to our foresight, to laws which would permit us to foresee its nature and its creations?

To this it has been answered that the Law is a creation of collective thought and that, whatever the particulars of the individual life, the group remains intact in spite of the change in its elements. We do not at all intend to deny the very interesting phenomena of collective thought, to which we have already devoted a chapter. Passed over unperceived for a long time, when they were discovered they evoked certain exaggerated statements which would probably no longer be made at the present day. It is certain that every social form is a function of psychological expression; that the same brain will think differently in a study, a drawing-room, an electoral assembly, a parliament, and so on. Every time that brains collaborate in the same work, the form of the collaboration is rediscoverable in the form and the substance of the collaborated idea. But the psychological power is in the brains and cannot be elsewhere.

However, the simplest observation proves that given a certain mass of ideas which exist at any given moment among a people, the attitude of various individuals with respect to these ideas may be very different.

1. The perfect social type. The individual belonging to this category brings no individual element to the various groups through which he passes. He always expresses the ideas of the particular environment and the particular moment in which he happens to be and to live without, moreover, being a zero in its formation. It would take no great effort of the imagination to write his complete biography, to reconstruct all he said under every circumstance, and to arrange a brilliant and varied career for him without deriving anything from his own individuality. Such a person, apparently neutral, is not perhaps without influence in society, because he nearly always has something individual about him, *i.e.*, his interest. His

talk is composed of nothing but banalities, but banalities which benefit. One should not scorn his personal rôle in history.

2. The voluntarist type. This is the man of action. He brings energy into the group; accordingly, the ideas which he champions will be more particularly upheld. His influence is very often decisive. It must be remarked however that the man of action is rarely a thinker; but this is not necessarily always the case. The man of action often leaves very little trace of his individual thought through the fact that not always does he have much of it. Sometimes even the cause which he serves is imposed upon or pointed out to him by circumstances rather than by his personal originality. When one speaks of "force of will," "education of the will," the word "will" is taken in a special meaning which is far from being the philosophical meaning. He who has "will" in the ordinary sense, is he who follows a line of conduct which he has laid out for himself or which has been laid out for him, not he whose acts of volition are the most personal, not he who puts the most individuality into his words and his actions. The misunderstandings through which "endurance" and "philosophical will" are confused are frequent.

3. The intellectual type. The intellectual man takes the particular ideas as he finds them, refers them to his own mentality, and gives them a new form. He injects his personal logic into the Law or into institutions and thus communicates it to society.

4. The type of the genius. The genius, whose rôle in history has been so much discussed, is he who draws out from his own individuality ideas that are totally unperceived at the time he presents them. He brings into social life the maximum of individual contribution. To be sure, we do not know how far down into his subjectivity it would be necessary to go to be able to under-

stand the exact nature of his contribution. We mean simply to express a fact that is incontestable according to even superficial historical observation — although it has been denied without reason — that there are individuals who are in absolute opposition to the mental atmosphere in which they live.

This classification admits of no hierarchy, no judgment whatever upon the relative values of the four categories in question. All may contain very remarkable and very ordinary men. Its sole aim is to summarize the different forms of the influence of the individual upon society. The procession of human thought varying of necessity according to the preponderance of any particular type, the rôle of the incessant renewal of the human personnel appears to be of considerable importance in history.

II: *Multiplicity of the Creative Factor in Law.* In order to know the resultant of a combination of forces, it is necessary to know what these forces are and to be able to measure them. The production of every juridical phenomenon is nothing more than the resultant of a combination of forces which we cannot measure and only a few of which we know. It is therefore impossible to foresee the realization of such phenomena.

The capacity of the human cranium and the nature of the brain form one of the prime factors in all mental labor. No one can dispute the fact that if mankind should assume the skull of the gorilla, juridical science, like art, philosophy and human customs, would be considerably affected. This hypothetical degradation could not be denied; it would be, however, only the result of a series of degradations less sensible but quite as real. Now cranial capacity is inherent in the race, and the future of each race depends upon circumstances which we cannot know.

If we suppose the intellectual power of humanity at a given moment to be known, how will this affect the psychological labor that creates the law and institutions? It

will result in a combination of phenomena, some springing from collective, and others from individual psychology.

Collective psychology expresses the tendencies which every social form gives to individual thought. The decisions at which any particular group will arrive, the ideas and the customs it will adopt, will vary every time that the method of grouping is changed. It would be indispensable therefore to know exactly what these various methods of grouping will be in order to foresee the future of the Law.

It would not be less necessary to know how the various elements of individual psychology will become associated. These elements are numerous: (a) the most widely opposed sentiments meet and conflict in juridical work; (b) the most varied intellectual forms; diseases of thought, reason, logic, and the metaphysical principle of justice, know therein their moments of triumph and of defeat. Finally, (c) material and economic factors in all their complexity obtrude their combined forces and modify even without one's being aware of it the direction of pure thought.

It is very easy no doubt to simplify the problem by choosing from this list a single one of the factors in juridical creation and considering all the others as non-existent. This method of procedure has often been adopted. But it is absolutely impossible to justify to the slightest extent this fashion of reasoning. In legal history, there are no laws of realization. The multiplicity of the factors which may play the part of obstacles to one another, renders them absolutely impossible.

III: *Rational Laws of Realization.* There is no necessity of swinging from one exaggeration into another. From the fact that there is no logical means of deducing from the existence of a social fact the necessary realization of some other particular social fact, it need not be concluded that we must abstain completely from all consideration

of the future. But these considerations are beyond the pale of logic and belong to the merely rational, intellectual labor that is not rigorous but is indispensable in practice. There are social facts which may legitimately induce the provision of others without this prevision ever having the character of certainty. We shall term such previsions rational laws, although the word "law" is scarcely a happy one in this instance.

Rational laws follow more or less vaguely the contours of logical laws and are characterized by *probability* and not by certainty. Given the series A Z in which logical law would permit the deduction of the *necessary* realization of Z from the existence of A, rational law could deduce only the more or less *probable* realization of something more or less resembling Z. Appraised at their correct value, these generalizations are of the greatest interest and form the substance of history. To deprive oneself of them would be a crime. For however numerous they may be, and even if they are apparently contradictory, they will end by all agreeing more or less with one another.

Every historical law is a formula in which there is something true, but nothing necessary. Take Jhering's formula, "The history of punishment is a constant abolition," which might be translated by this other formula: "The more cultivated a people becomes, the less cruel it is in the repression of offences." It is none the less true that the penal law of the sixteenth century, a period of great culture, was infinitely more cruel than that of the twelfth or even of the seventh century, periods of extremely little culture. He who affirms: "As they become more enlightened, men will become less wicked," says something that is very reasonable but not very certain.

Rational laws of cycles and rational laws of oscillations are numerous in the history of civilization and in juridical history. Luther's tipsy peasant riding upon his donkey,

lurching first to the right and then equally far to the left, is the symbol of laws of oscillation. Thus societies oscillate between liberalism and despotism, belief and unbelief, practical law and scholarly law — repulsed by that which has attracted them for too long a time and only crossing the point of equilibrium. To derive new rational laws is to render a service to the understanding of history, but to try to transform them into laws of logical realization is equivalent to falsifying their nature.

IV: *Metaphorical Laws or Formulas.* It frequently happens that one and the same formula may be applicable to a great number of phenomena and those of very varied nature: division of labor, differentiation, competition, imitation, selection, adaptation, concentration, tendency to organic harmony, and so on. The fact that we may class under one of these denominations, phenomena of a physical, a biological, a moral, or a juridical order, establishes no similarity in the nature of these various phenomena. An egg the cells of which become divided and differentiated during incubation bears no relation to the division of the three powers, legislative, executive and judiciary. There may be a certain analogy between the mechanism of the two operations, but an analogy simply of form and not of substance.

Many minds are greatly struck with these coincidences in the structure of phenomena that are by nature very far removed from one another, and find in them something deep and mysterious. For them they are laws, true laws of nature, since they are exhibited in all domains with remarkable regularity. As a matter of fact, these are in nowise laws, but simple formulas, successful because they introduce a certain unity of form into the diverse branches of human knowledge, but with no other significance. Every phenomenon of adaptation, division of labor, and so on, preserves its special "*raison d'être*," its special nature and its special effects.

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CHAPTER II

EVOLUTION, CHANGE, PROGRESS

§ 1. INTRODUCTION.—§ 2. VITAL EVOLUTION: (I) NATURE; (II) EVOLUTION OF THOUGHT AND OF INSTITUTIONS.—§ 3. TRANSFORMISTIC EVOLUTION: (I) ITS DOMAIN; (II) SURVIVANCE AND ARCHAISM.—§ 4. PROGRESSIONAL EVOLUTION: (I) CONCEPTIONS OF PROGRESS; (II) GENERAL OR SPECIAL PROGRESS; (III) CHANCES OF ITS REALIZATION.—§ 5. EVOLUTION AND THE UNIVERSE; (I) HIDDEN PLAN OF THE UNIVERSE; (II) THEISTIC AND PANTHEISTIC SYSTEMS.

§ 1. *Introduction.* The diverse ideas which may be comprised under the word "evolution" are not absolutely new. It would not be difficult to discover their elements: in the literature of very old peoples. Nevertheless it is only within relatively recent times that they have been introduced into historical methods and applied regularly and systematically.

Like all words which enjoy any degree of prestige, the word "evolution" has a rather fluctuating meaning, which first of all it is well to point out precisely. In its original acceptation, it signifies simply the gradual transformation which beings animate and inanimate, things and thoughts, undergo through the effect of time. The play of causes and effect taking place in time and not being able to take place outside of time, evolution would thus lead back to universal determination and would be an expression of no particular interest. But the expression evolution may be restricted to the living being and employed to designate the transformations which it undergoes in the course of its existence through the very fact of life. This will be the *vital evolution* which describes the ages of every existence from the cradle to the grave,

In another sense, *transformistic evolution* establishes the kinship of all living beings and of all species, and explains their differentiation through the diversity of conditions to which they have been submitted in the course of time. In the physical as in the moral domain, it traces complex forms back to simple primitive forms.

Finally, certain evolutionists believe that it is in the nature of living beings to become raised from lower forms toward higher forms by a slow but steady transformation. Such evolution may therefore be termed *progressional evolution*.

§ 2. *Vital Evolution*. It is the lot of every living being to pass from birth to death by a series of periods of growth and of decay which constitute the whole of its life. It evolves by virtue of its own vital force, but also under the influence of the natural forces surrounding it. The living being has its own energy, possesses in itself the direction of its own destiny; but more than the dead body it is dependent upon its environment. It is able to subsist only by an incessant action upon forms of matter which are foreign to it, otherwise it loses life.

I: *Nature of Vital Evolution*. Would the living being plunged into abstract time be capable of any development whatever? It is certain that it would not. But what would be lacking would be perhaps the substance of development and not the "elan," the potentiality.

Nothing can claim to be eternal. But animate and inanimate bodies are, in relation to length of existence, very differently situated. A body devoid of life may, in certain states of isolation, subsist indefinitely without undergoing any appreciable change. A living body may not remain such without undergoing at every instant a series of incessant transformations. Life involves continual toil, and through this continual toil the being increases in size, develops, reproduces itself, becomes weaker and dies. Time is always filled by a series of phenomena through

which life is able to be preserved and which are perpetually substituting a new world for an old. "It is time which kills us," says a popular proverb. No, time kills no one. But the living being cannot be locked up like a medal which can lie several centuries and immediately appear as new. It can live only through a continual struggle which wastes it away more or less rapidly. It is therefore impossible to know what rôle in the existence of a living being pertains to the inner vital force which is peculiar to it, to its spontaneity, and what rôle, to the exterior environment in which the being is developed.

The totality of the exterior forces with which each is obliged to come into continual contact in order to live and which may be termed the environment, is often almost identical for a large number of individuals. All men are born, grow, live and die in certain conditions which are common to the whole human race, and in certain conditions which are common to the whole of a group or are peculiar to each individual. Childhood, maturity and old age are the regular phases of every human life. Hence certain traits of resemblance among all destinies.

II: *The Evolution of Thought and of Human Institutions.* When we speak of the evolution of a civilization, an institution, a technic, or a logical form, do we simply use a happy metaphor, a successful piece of imagery, that enables us better to engrave upon our memory a certain succession of facts, but does not enable us to understand its true mechanism? Or is there on the contrary some similarity, perhaps even an identity, between this growth and the wear and tear through time which living beings undergo by the very fact of life?

Moral evolution appears at first glance very different from physical evolution.

(a) It is generally understood that there takes place among individuals a moral evolution corresponding to

the physical evolution. But this phenomenon, purely an individual one, is in itself of no great importance in history. There, it is an entire people or a still larger group whose birth, prosperity, decay and death are observed. Now every human collectivity is composed — at least nearly always — of one and the same proportion of children, adults and old persons. The play of birth and death allows it a very nearly equal sum of intellectual and moral vigor. Accordingly, it may be said from this point of view that every human grouping is always of the same age, and since its physical state is always practically identical, its moral state would of necessity always remain stable.

(b) To this it is answered that evolution affects the collectivity itself and not the individuals which compose it. If this point of view were admitted, there would still be a great difference between the evolution of the animate being and moral evolution. The first is produced necessarily by contact with life and is more or less regular. Ten men born the same day will not all die the same day, they will not grow old at exactly the same time; but the differences will be quite slight and will not pass a certain limit easy to be foreseen. Of ten peoples of the same age, the destinies in the course of time may be extremely varied. Upon one and the same date, a people that is said to be young is as far as duration is concerned as old as an old people. The one which has finished its evolution is of the same real age as the one which is just beginning it. Accordingly, moral life may be suspended indefinitely and resumed abruptly, which is contrary to the physical life of animate beings.

(c) The phenomenon of moral evolution in humanity is particularly complex, because the great history of the human race is made up of the history of civilizations, the history of civilizations of the history of peoples, the history of peoples of the history of lesser groups, etc. In

great histories and in small, this regular advance toward development, and then toward decline, is equally marked.

The history of humanity is not to be confused with the successive histories of diverse civilizations (in the concrete meaning of the word).

In every age, the world contains at the same time living and active peoples and stagnant peoples. In our day, certain races are more savage than other races were three thousand years ago. Written history speaks of peoples which act and not of those in a state of stagnation. What would it have to say of such peoples? But the real history of humanity could not neglect them. Its function would be to furnish with exactness for every moment of time the proportion and the respective power of civilized and non-civilized peoples. The physiognomy of the human race taken as a whole has undergone incessant and continued variations. And very probably sooner or later, when its evolution will have been completed, the life of the human species will reproduce the phases of the life of the individual: birth, growth, zenith, decline and death. Of course, this is only a hypothesis which can never be verified but may be of use in the general understanding of history.

Leaving the non-civilized out of the question, if we consider the totality of peoples in contact with one another, in touch religiously, morally, and intellectually, we obtain a "civilization" in the general, but concrete meaning of the word: Grecian, Roman, Christian, Islamitic and other civilization. Every great civilization knows the phases of growth, zenith and decline. It is not always easy to state their limits precisely. Furthermore it is generally agreed that the life of a civilization is the synthesis of the life of a certain number of peoples, each of which has its own evolution. In the Grecian civilization, Asia Minor, Athens, and Lacedemonia had their periods of grandeur and decay. If one cared to enter upon a

more detailed examination, it would be easy to establish the fact that the evolution of peoples is the synthesis of the evolutions of less numerous groups, — tribes, classes, families, — so that these movements of moral and institutional evolution will always have in them something indefinite and fluctuating. No certain conclusions could be drawn from them, but it would be wrong to deny their reality.

(d) The word "civilization" has a double meaning. It may be applied to the totality of peoples united in a common work, living more or less in contact with one another and exchanging ideas and customs. There were not only true Greeks in the Grecian civilization; still less, was the small Roman people the sole author of Roman civilization. The totality of peoples which are united in one and the same intellectual elaboration forms a social and historical group which may be termed "civilization-group."

To this civilization-group of human beings living at a certain period and under certain conditions may be contrasted, from the view-point of terminology, the "civilization-condition," the totality of psychological elements which remain stagnant among stagnant peoples, and are incessantly transformed among progressive peoples.

A civilized people is one which is found to be in a condition of motion. In practice, the condition of civilization is only perceptible after a certain period of ascendancy and no longer so when decadence is at hand. Now all the intellectual elements whose successive transformations produce the general evolution of a civilization move independently of one another. Philosophy, art, economics, and law each has its own distinct life and becomes transformed more or less rapidly according to circumstances. Each of the great disciplines is itself only the synthesis of more restricted disciplines which have their own peculiar movements and their particular destinies. Thus for art: dancing, poetry, music, painting, and architecture flourish

or fall into a state of decadence independently of one another. It is the same with law: political, technical and practical law, although they mutually influence one another, do not have the same periods of brilliancy or of decline.

This life of peoples, civilizations, and institutions which is all presented under mysterious forms permits of a very positive explanation, if one is willing to admit that all collective psychology can be traced back to the psychology — or, if it wished, even to the physiology — of the individual. Take an individual arrived at the age of reason whose ideas upon any moral or intellectual question whatever are settled. Forty years later, his ideas upon the same question will have become changed through work and experience and also by the wear-and-tear upon the brain in its contact with life. Such is the elementary phenomenon, the grain of sand which, enormously multiplied, will form the immense domain of human evolution. The idea modified by an early evolution in the course of a human life will not be presented by the father to the son just as the father received it, but in a riper form. The son, if he holds the same idea, will transform it in his turn and transmit it thus modified to succeeding generations and so on; accordingly, at the end of a certain time, the thought of a young man is no longer a young thought. It shows perforce signs of the experience and the wear-and-tear of life of his ancestors. Thus are formed societies in which predominate by turns, the tendencies of youth, maturity, and old age.

It is therefore quite natural for the course of moral evolution to be very irregular, for peoples to remain for ages in the same state of mind, without changing their beliefs, and carrying on the same industries and observing the same usages. In so far as a moral element is not connected with the individual life by mental effort, it remains indefinitely like itself; it experiences neither devel-

opment nor decay. This is not life, this is not death; this is stagnation. Thus the moral elements of existence may, like inanimate objects, be shut off from outside friction and so last indefinitely. The more they participate in human activity, the more rapidly they become worn out. This is the case with laws and with the Law, as a whole, as well as with religion, morality, and philosophy.

Thus the numerous works which philosophers of history have devoted to the comparison of different civilizations and of periods in their history are not mere child's play. They correspond to something real and positive. By the force of circumstances, their results will always be extremely uncertain, which is no reason to neglect them. Thus one may compare the middle Grecian age, the tenth to the seventh century B.C., with the middle Christian age. Between the two periods there are certainly resemblances which are not simply fortuitous but pertain to a certain equality in the ages of the two eras of civilization. But the same mechanism of evolution in the moral life of humanity shows us that these comparisons could not be pushed too far.

§ 3. *Transformistic Evolution.* The theory of transformistic evolution is based upon two essential hypotheses:

(a) The original kinship of all beings derived from atoms at first identical. To avoid any embarrassing controversy — of no use here — upon the identity in origin of the organic and the inorganic, it may be stated more modestly: the original kinship of all living beings derived from cells at first identical.

(b) The formation of species by a slow differentiation resulting from the variety in the conditions of existence, from the influence of environment upon individuals through generations. This second hypothesis is moreover only a corollary of the first. Because since living beings are at the present time widely separated from the physical, the psychological and the social point of view, it is

logically necessary, if we suppose them to be of common origin, for a series of manifold and indefinite causes, which may be called the "conditions of life," to have differentiated them.

By this theory, the characteristics of every living being are explained in their entirety by its history and the history of its species. The higher forms of life, the most advanced animals, have been, according to circumstances, more differentiated and farthest removed from the primitive forms. The rudimentary forms have, on the contrary, undergone the least changes. Applied at first to the physical development of animal species, the same hypotheses have led to the better understanding of the cerebral, that is, the intellectual, formation of man. Just as the higher species have arisen from the lower species by a succession of certain particular features of their history, the higher functions of intelligence spring from the lower functions and owe all their improvement to the external and accidental circumstances which have permitted and instigated their development. Accordingly all systems of morality, and Law, all religions and institutions, are born of the same primitive psychological elements. Their diversity is explained by the inequality in the degree of their kinship to the original type as well as by the diversity of the environment in which their development has occurred.

Thus the theory of evolution binds together all living beings, considered in their physiology, their psychology, their logic and their customs, into an immense genealogical tree where the most advanced and most completely modified forms are none the less related to crude and slightly developed forms. This kinship is of great value in the understanding of history. It permits the past of superior beings to be discovered in the present of inferior beings. It permits human thought to be studied from its humblest beginnings, all its effort toward the best to be

traced, and even, up to a certain point, the influences which have allowed and incited its improvement to be divined. Very primitive man undoubtedly resembles certain animals which we may know, as well as children, or deaf-mutes^a who have not profited by historical education. Savages are, more or less, what the ancestors of civilized men were. Semi-civilized peoples present as many phases of transition, and the general comparison of their psychology and manners is the best means of re-building history.

By comparison, the legal systems of all peoples will be mutually clarified. The study of primitive peoples aids in the understanding of what the most civilized peoples were in a more or less distant past, and the history of civilized peoples allows one to divine what transformations primitive peoples may undergo. Nevertheless, as far as Law is concerned, comparison cannot be made by means of juridical documents properly speaking. Because every juridical document however ancient implies a relatively advanced state of civilization. The true origins of institutions and their oldest forms could not be revealed through texts of this nature. It is necessary to have recourse to ethnography, and folk-lore, to discover the rudimentary psychology from which the subtle and refined legal psychology is descended.

The theory of transformistic evolution and the comparative method which springs from it — every comparative method is not necessarily based upon transformism — have rendered tremendous services to the history of Law, as well as to all history and to Law itself. These ideas have above all else given inspiration to workers of all countries, and the tremendous documentation which has resulted from them has thrown into complete confusion the ancient conceptions of history. The accumulation of materials has, however, not been without inconvenience. The philosophical interpretation of documents has not

been able to keep step with the quantity, and the comparativists have found themselves embarrassed with their too great riches.

Maxime Kovalewsky, one of the masters of the school, acknowledged this not very long ago, and, so far as I know, the situation has not changed much since. He recognized the fact that the science of the primitive history of humanity lacked "general conclusions." But is it certain that by reconciling all the documents, general conclusions could be established which would force themselves upon the conviction of everyone without any possible discussion? This is hardly possible. Moreover, it is not a question of criticizing the comparative method, which would lie beyond the scope of our work. It is the idea of transformistic evolution which alone interests us here and the import of which it behooves us to examine.

I: *Domain of Transformistic Evolution.* According to the very principle of evolutionism the diverse human races must spring from a single type. But this single type might be prior to humanity, perhaps even very long. The old tradition of an Adam and an Eve peopling the earth with their descendants was simply a symbol of human history; the reality is more complex. Pre-historic anthropology raises problems which it cannot solve with any degree of certainty. Was the quaternary man descended from the tertiary man, and have these beings left direct descendants among our modern races? Have these modern races common human ancestors? Is the brotherhood of men contemporaneous with the birth of men or must it be traced to the more or less distant precursors of man?

It is very possible, not to say probable, that the precursors of man inhabited diverse regions of the terrestrial globe without intermixture and even without knowing of one another's existence, and that they had acquired the human state independently of one another. In this case,

the original tendencies of each primitive race must have been extremely diverse and, in the course of history, humanity evolved, through intermixture and disappearance of certain groups, toward unity and not toward multiplicity of type. According to the opposite hypothesis, which may be schematically represented by a single original human couple, the divergences of race, non-existent in the beginning, are the product of life through the passing centuries. Evolution therefore would have made the differentiation and not assimilation.

These obscurities upon the origins of the physical man are, it must be confessed, greatly to be regretted. The slow formation of the brain and the skull, the most persistent bases of the moral and intellectual faculties in the diverse races, escapes us, and, accordingly, transformism does not supply everything concerning the origins and history of humanity that might be expected of it.

It is easier to reestablish the psychological evolution of man in its broad outlines. Between the most rudimentary and the most developed intelligence within the range of observation, it is possible to establish certain phases or stages which must have been traversed in order to pass from the one to the other. The power of abstraction is one of the best criterions of brain value. Under its most elementary form, it becomes reduced solely to the faculty of discerning certain resemblances and certain differences in the concrete world, and this faculty is anterior to the creation of language. The power of abstraction is intimately connected with the employment of the word attached to the idea. It progresses with language, attaining with the adjective, the idea of quality independent of body, and with the substantive, the idea of the individual, the class and the species.

Through the higher forms of abstraction, man has complete control over the concrete, analyzes its various elements, discovers the skeletons of beings and encloses in

general formulas an infinite number of particular truths. Finally, the intelligence arrives at a still higher state when it sets itself to the criticism of its own work of abstraction, when it seeks to state the exact relations between this work and reality, when it tries to determine the logical value — varying according to circumstances — of this work, the good and evil of which are easily misunderstood.

Undoubtedly, the human intelligence has in the course of generations passed through these different stages. At what moment? That is another question. Perhaps in a prehistoric, perhaps in a historic age. What was the power of abstraction of the brain of civilized man, three, four, five or six thousand years ago? We know nothing of this at the present time. Perhaps there were to be found races much better endowed in this respect than are many modern races.

In spite of the numerous and splendid works to which it has given birth, psychological evolution has never been treated from a truly historical point of view. The evolution of institutions, usages and manners has been studied in a more chronological fashion. Information furnished by old documents, by folk lore and traditions, permits this. The earliest needs of a rising humanity have been almost everywhere the same; hence, a great uniformity in primitive institutions. Since the circumstances of life became diversified for each people, as some lived by war and pillage, others by the raising of cattle which were pastured over wide spaces, while other industries flourished in other countries, institutions likewise became diversified, without, however, completely losing their original resemblance. The universality of certain primitive institutions is striking. Is this due to an identity of evolution? A detailed study of history alone can allow an answer to this important question; because currents of imitation of one country by others may also have trans-

ported any particular institution to very great distances. In certain instances, identity of evolution without borrowing seems certain; in others, the question is doubtful.

It is, on the other hand, certain that to these astonishing similarities there are opposed not less astonishing dissimilarities between peoples of very nearly the same degree of civilization. In the matter of sexual questions, for example, men seem to have invented at a very early date all that it was possible to invent. It may very well be that for many institutions every imaginable branch has been exhausted; so that resemblances in the institutions of peoples at great distances from one another, far from signifying identity of evolution, might sometimes signify quite the contrary.

The evolution of technical Law is, beyond all possible question, extremely varied. Even peoples closely related through race, customs and geographical situation have very different types of juridical logic. The formation of the juridical technic of a people is a product of the logical and the political evolution of that people. It is accordingly a very complex phenomenon and one that has as yet been little studied.

II: *Survivance and Archaism.* Certain philosophers give the name survivance "to the reappearance of an ancestral characteristic which has disappeared in the intermediate generations." We mention this terminology only to avoid it and to point out the danger of ambiguity. It would be better to call the facts of atavism "revivance" than "survivance." We shall term "survivances" the vestiges left by a society of an earlier type in a society of a later type. Everything in manners, institutions and law which is explained by the past and not by the present may be considered as survivance, or, to be more precise, everything which would not be introduced just as it is in the customs, the institutions and the law of a country, if it had not already been found there. A sur-

vivance is not therefore without use in the present; indeed, it may be of even greater use in the present than it was originally. But its creation without the aid of history would be incomprehensible.

Let us take the following classic examples: The "nobility" of England has been for a long time out of harmony with her democratic constitution. It is however an essential organ of the English colonial power. It would be hard to imagine an England as a world-power deprived of all aristocracy. In France, many impartial minds think that the political manners are not in perfect accord with the democratic ideal whose realization has been attempted for a long time. The authoritarian idea does not seem to have died with the Old Régime. The Revolution broke the mirror in which the features of the absolute monarchy were reflected. But every piece of the broken glass has reflected a tyrant of different dimensions, a small Louis XIV, or a small Cæsar, with vigorous bearing and the authoritative manner. No longer can any say: "I am the State," but many can say in retort: "I am this piece of the State." The mental habits of the absolute monarch have survived him. This is a psychological survivance. It is not born of institutions of the present, but it dominates them. There is certainly no accord between philosophical principles and practice. Is it necessary that there should be this accord? Can a very great people be truly democratic in its manners? Would it not be dangerous suddenly to risk the experiment? Is it necessary to make over everything new in order to establish between theory and practice a harmony which would disappear tomorrow?

Manners and the mental state of a people may be survivances in relation to its institutions. Institutions may be survivances in relation to the general tendencies of legislation. Every law text which would no longer be framed today as it is framed, no longer corresponds to our

present-day mentality but to an older mentality. It expresses the conceptions, the manners, and the creative logic of the past. Accordingly, when a law grows a little old, it becomes a survivance. There are very recent survivances that are very much out of fashion; and others that are quite ancient and yet very much in public favor. Besides their present utility must be judged neither by their age, nor by the degree of their popularity or their unpopularity.

An archaism — at least what we shall call such — is a remnant of the past having no use in the present. It has preserved its characteristics and its original rôle; it is a psychological, social or institutional form which can have no “raison d’être” except in very primitive societies. Its existence in an advanced civilization is an anomaly. Certain savages and certain criminals are archaic beings; the archaic being living in our day may be compared to the ancestor of civilized man. On this score, he is always interesting from the historical point of view. But it is not certain that he reproduces exactly the same traits, because the archaic being living in our day has his personal history, his own evolution, through which it has been possible for him to acquire certain original traits which would not belong to the primitive type.

Advance toward civilization follows in general a regular order by virtue of which a particular institution is followed by one, and preceded by another particular institution. The clan is prior to the city, the city to the state; private vengeance precedes repression through the public authority; the matriarchate is, in one and the same civilization, prior to the patriarchate; and so on. This order in the progress of institutions is regular, but not necessary. It is reversible and interversible. History shows us that a people may very well abandon advanced institutions and turn backward to adopt those that are much more primitive.

§ 4. *Progressional Evolution.* There are persons who believe in progress and others who do not believe in it. Discussions in everyday conversation serve scarcely more as a basis for a reasoned opinion upon the subject than do political speeches, however unreasonable it may be to make fun of the one and applaud the other. But it is not difficult to collect an abundance of much more serious literature upon the question of progress. Great philosophers, numerous sociologists, and thinkers in very diverse categories have passed long days not to say long years in studying the problem. There have even been brilliant congresses employed entirely and solely in examining its various aspects. Among those who might have read everything and heard everything, there would still be found people who would believe in progress and others who would not believe in it. Instead of giving a personal opinion, we should try to gain a clear understanding of what may be contained in these two formulas, "believe in progress" and "not believe in progress." This labor is in itself quite complex: it involves the solution of three groups of questions at least, for it is very possible that I am overlooking some elements of the problem.

1. What is the meaning of the word "progress"? What may be the logical nature of this idea?

2. May there exist a general progress for humanity as a whole or a series of special independent forms of progress?

3. What are the chances of the realization of this progress or these forms of progress?

I: *Conceptions of Progress.* From the scientific point of view, progress is an increase of knowledge in a positive discipline. This increase may be verified very precisely for all epochs. It is possible therefore to affirm scientifically that the physical and natural sciences have progressed since a particular date. This affirmation does not carry any judgment of value. This increase of knowledge is likewise in certain instances, an increase of power. This

verification is still in the realm of positive logic. Scientific progress thus understood is incontestable. But is scientific progress a benefit to humanity? Some naïve minds admit it without question and can entertain therefore the most entire confidence in the future. They are, moreover, neither right, nor wrong; they state a pure judgment of value which requires justification or at least explanation. It is not false to say "Progress is an advance toward the best." Such a formula, without being at all scientific, is not void of meaning. It may have quite varied meanings. There are several conceptions of progress.

(1) *Conventional conception.* Suppose a certain number of individuals placed in a certain situation and capable of imagining a series of other situations which would be in their eyes more and more desirable. Finding themselves in state *a*, they all agree in acknowledging that *b* is preferable, that *c* would be still better and so on to *z*. By agreement, the passage from *a* to *b*, from *b* to *c*, etc., would logically constitute a progress. The scale of progress rests upon a judgment of value common to a certain number of persons and according to which certain social states are classed in a certain order.

This conventional idea is not purely theoretical and invented for the occasion. It is, on the contrary, very practical. Judgments of value are frequently held in common among all men and serve unconsciously as the basis of appraisal. Two individuals born in the same environment, subjected to the same influences and of the same intellectual capacity have a very long scale of common evaluations and nearly always agree in asserting that a particular change constitutes or does not constitute progress. Their accord with their circle of friends and acquaintances convinces them that they reason upon a solid basis, whereas their affirmation is purely conventional and arbitrary.

As a matter of fact, to this scale of progress, there may be opposed an infinite number of other scales which contradict its terms and possess exactly the same logical value. For other individuals born in another environment, subjected to other influences, and being of a different intellectual capacity, place neither the good nor the best in the same directions nor in the same order. These different conceptions are all equally justified, being all relative and conventional.

In general, what is done by tacit agreement may be done by expressed agreement. We may agree to call progress any displacement of a body in any particular direction, any transformation of nature in any particular way. It is then possible to affirm that, being given the agreement, a particular change constitutes or does not constitute progress. But the judgment of value which might result from this assertion has no other logical meaning than the proof of an accord of appraisal among certain individuals.

(2) *Subjective, quasi-universal conception.* Given any being whatever, can it be affirmed that it is a good for it to exist, an evil not to exist? That it is a good for it to have pleasure, an evil for it to have pain?

These two propositions may at first sight appear true with an objective verity and aside from all convention, by the fact that all or nearly all animate beings wish to live and to live happily. But it must be remarked that however elementary, these two truths are not always in agreement with one another, because, in cases where existence occasions only pain, it cannot logically be asserted either that existence should be continued in spite of the pain or that in order to escape pain, existence also should be escaped. The choice between the maximum of existence and the maximum of pleasure or the minimum of suffering can only be an arbitrary one. Now it is easy to prove that these two conceptions taken separately as cri-

terions of progress lead to very different scales of evaluation. The maximum of existence admits of the maximum of duration and the maximum of power. It very often involves incessant effort, hardship and privation. The maximum of enjoyment admits of leisure, great expenditure of wealth, and a wise choice in the accumulation and combination of pleasures. "Short and sweet," says one. "Long, however difficult," answers another. "Let us try to reconcile the two as far as possible," will say a third who is perhaps the true sage in practical life, but who takes away from us at one blow every logical conception of progress and substitutes for it vague personal impressions.

Logically, it must be said that for every being there are two ways of progressing which are completely independent of another and must not be confused: to increase in existence, and to increase in pleasure. The judgments of value upon which these two ideas of progress are grounded are not purely conventional but are based upon the almost universal subjectivity of living beings: in the sense that all wish to live happily, but each by his own understanding of how happiness is to be extracted from life.

(3) *Metaphysical conception.* The transcendence of the beautiful, the good and the just directs consciously or unconsciously the majority of human evaluations. Undoubtedly an attempt is very often made to reduce these three ideas to the relative, which is logically equivalent — as we have seen — to annihilating them. To say that art is a question of fashion, morality a question of habit, and law a question of politics, — to rob these three disciplines of all metaphysical content, is logically to deny the possibility of evaluating things from the view-point of the beautiful, the right, and the just. Because between two individuals, one of whom would affirm, and the other deny the superiority of one thing over another from this triple point of view, it would be entirely impossible to say that one was right and the other wrong.

But the transcendental and absolute character of the three conceptions is only a hypothesis which will always remain a hypothesis that no deduction nor experiment can ever transform into positive data. By virtue of this fact we find ourselves in the domain of metaphysics. This domain is not inaccessible to human logic, because a course of hypothetical reasoning may be conducted as rigorously as one that is not hypothetical. Nevertheless the formula corresponding with the abstract conception must have been previously established. For the beautiful, this would be difficult, perhaps even impossible. For the just, on the contrary, the "*sum cuique*" furnishes a very satisfactory definition.

Accordingly we may logically say that Law is progressing metaphysically when its diverse dispositions draw nearer to the "*sum cuique*." This approach may be substantiated with as much certainty as is possible to human intelligence upon any question whatever. But metaphysical progress does not signify general progress of the Law. For a legal system that was progressing from the point of view of justice might be moving backward as far as its efficacy, its utility and its technic were concerned. The general progress of Law would have to be established by a series of particular forms of progress difficult to enumerate and still more so to establish.

It would be the same with moral progress. In itself this expression has no meaning, morality being not a homogeneous discipline, but one that contains various and sometimes contradictory elements. In it metaphysical morality is opposed to ritual or social morality. Metaphysical morality studies the metaphysical good which like the just admits of formulation. Metaphysical good consists in refraining from inflicting the least evil upon any living being and in securing for everyone the most pleasure possible. It judges acts by the good or the evil that they may occasion or that they are destined to accomplish.

Social or ritual morality binds individuals to conform to certain usages outwardly approved by the society in which they live. It is a product of collective thought as we have interpreted it. Every method of grouping needs some form of morality to maintain it as it exists; accordingly the same individual who belongs to several groups will have several, sometimes contradictory, moral codes. Suppose a member of parliament belongs to a club where gambling is indulged in. In so far as he is a member of parliament, he will refuse to sanction the debt incurred as being of an immoral origin; in so far as he is a member of the club, he will sanction to the extreme the means of assuring its payment. Along with official social moral codes, there always exist non-official moral codes which are often violently combated by the State. To simplify matters, let us speak only of official social morality as opposed to metaphysical morality.

It is impossible for the two forms to be always in perfect accord. Resting upon different foundations, they may quite as well disagree as agree. Their rivalry is indeed of very great interest in the understanding of history. Very often there have been seen to arise great hearts and great minds which have had a very marked preference for metaphysical morality. The New Testament especially constitutes the greatest effort to bring about the preponderance of abstract goodness over the social conceptions of the moment. Christ declares many times that the importance of social crimes — failure to observe the Sabbath, the woman's adultery — has been considerably exaggerated; above everything he puts the law of charity which through love of one's neighbor leads to metaphysical good: to avoid inflicting suffering upon another and procure for him as much happiness as possible. But when Christianity took charge of the organization of society, it restored to the ritual morality, predominant in

the Bible, all its former sternness. This is the history of many religious movements.

Ritual morality is an organizing force and is justified by its utility. All reflection, all heart-felt emotion is of a nature to destroy its authority. It can only be maintained by custom and by violence. Wherein lies the truth of Durkheim's fine reflection upon the function of punishment: its object is above all else to maintain social morality. Certain acts are odious only because they are severely punished by law or general disapprobation, which is nearly always a material as well as a moral penalty. To him who attacks with logic the rite of the moment and says to social morality, "Strike, but listen!" it may only answer, "I strike, but will not listen!" For if the violator of a rite succeeds in making himself heard — which happens sooner or later — the rite is condemned, the society disorganized for some time. A new rite must be established which will hold sway until some energetic iconoclast comes to destroy it in its turn.

Instinctively, societies show themselves infinitely more severe in the repression of ritual crimes than in the violation of metaphysical morality. Faults which occasion no harm to anyone are punished much more severely than those which do. A short time ago a clever chronicler was astonished to see a soldier acquitted, who had shot his fiancée and her parents, while on the same day and under the same conditions, another soldier was severely condemned for bigamy. And the chronicler concludes, "This is perhaps very social, and very moral, but it is not perhaps very human." Not human! But it is a great part of the history of humanity. As all rites are of equal value, the substitution of one ritual morality for another ritual morality could not constitute progress. Metaphysical morality alone is capable of progress. Accordingly, just as it is impossible to affirm that Law as a whole is progressing by approaching the just, so is it im-

possible to affirm that morality as a whole is progressing by approaching the Good.

(4) *Rational conception.* The logical examination of social conceptions ought not to serve to condemn the understanding of them from a rational point of view. The rational cannot serve as a basis for the philosophic interpretation of law or of history, but in everyday practical life, it plays the largest part. There is no necessity to make any unjustified claims for the rational; but there is a necessity to recognize the importance of its rôle in existence. The rational conception of progress is formed by the juxtaposition of the three other conceptions, the conventional, the subjective and the metaphysical. This juxtaposition is not justified in logic, but is in practice.

Since each man pursues only limited objects and those that are brought to his notice by his environment and his associates, he may easily recognize that his objects are purely relative and conventional. Two persons playing at cards with nothing at stake, do not see their situation changed by the color of the cards they hold in their hands; for every point that they mark on their score, they believe they are making some progress. Players for whom the stake is purely imaginary are numerous in this world, and they are not the least passionate; but their conception of progress is entirely conventional. Nevertheless every one makes earnest efforts to produce changes in his situation in the hope that these changes will bring with them more power or more happiness to him and his. If he succeeds, he considers that he is progressing in the second meaning of the word. Finally, every time that a just solution comes to replace an unjust solution, or a cause of suffering disappears and a cause of joy or of happiness is produced, the public at large will call this progress also, but in the metaphysical meaning of the word.

Merging these different conceptions into one single conception, good common sense constructs from it an ab-

straction endowed with very great prestige, a sort of divinity which it follows everywhere that it thinks it sees it go. This is sometimes fortunate for it; sometimes unfortunate. But faith is in itself a recompense.

II: *General or Special Progress.* There is therefore in the popular conception of progress a prime defect. It confuses the scientifically and the conventionally best, the general and metaphysical subjectivity, conceptions of essentially different nature and totally independent of one another. This is not all. Suppose that there is a "best" in a single, precise and logically definable sense. Will it be possible by comparing two periods of one and the same civilization to affirm "There is progress here" or "There is no progress here"? And what would have to be done in order to make such an assertion?

1. First hypothesis. All the elements of civilization of the second period placed side by side and judged by the criterion of the best are found to be superior to the corresponding elements of the first period. In this case it will be legitimate to affirm that there is general progress. Unfortunately, there is very little chance for this hypothesis to be realized even once. It is almost certain that it will not always be realized. It is entirely certain that it has never yet been realized in historical periods.

2. Second hypothesis. The comparison results in the revelation of certain superiorities and certain inferiorities in both of the two periods. Is it legitimate to establish a sort of average and give its resultant as a proof of progress or of retrogression? Thus: the first period is superior in ten points, in morality, in hygiene, and so on; the second outstrips the first in twenty points, in artistic creation, in wealth, and so on; and the total of the two additions shows an advance of ten points to the advantage of the more recent state. Can it be declared from these facts that there has been progress? Evidently nothing could prevent a person from amusing himself by

making such calculations; there would be no sense in his doing so, however, because he would have combined in one and the same arithmetical operation objects of a different nature and those which do not admit of comparison with one another. Accordingly, as it has been very well said, although there may be progress as regards each of the elements of civilization, there cannot be any progress as a whole and in general for humanity or a portion of humanity.

There are therefore only special forms of progress which are independent of and very often even opposed to one another. This specialization should even be pushed quite far. Thus to say that one legal system is progressing more than another has no meaning; for law is composed of disparate elements; it may progress in technic and retrograde as regards the idea of justice, morality, practical utility, or other things. One juridical technic can only be compared with another technic, and each of the other elements to other corresponding elements and those of the same nature. Otherwise all comparison would be devoid of any logical significance.

III: *Chances of Realization of the Various Forms of Progress and the Destinies of Humanity.* Two extreme and, in a sense, contrary opinions should first of all be eliminated: namely, the necessity of progress and the impossibility of progress. It is evident in our present state of knowledge that no progress is certainly and necessarily to be realized in any element of human civilization and still less in its whole. It is also quite evident that in every element of civilization progress is possible. The necessity or the impossibility of progress are both refuted by the fact already established that all laws of realization are non-existent or inaccessible to human intelligence.

What will the humanity of tomorrow be? No science can give a certain answer; only probabilities at best. It

is beautiful and reassuring to see an orator in a burst of eloquence pin his faith, with as much enthusiasm as Demosthenes did to the heroes of Marathon, to the immortality of some particular human conception and its preponderance in the future. Hard reality does not allow conceptions to live when brains cease to live. It does not bestow upon all human brains the same intellectual power. Whether it is a question of practical life, of science, of art, of philosophy, or of law, the cerebral physiology is at the bottom of everything. Brain combinations which are being formed at the present time by a mixture of blood are the foundations of the future of humanity, and we do not know what these combinations are, perhaps they will be fortunate for this or that discipline; perhaps for all disciplines; perhaps for none. The various factors in the development of peoples taken each in its turn would not admit of any application whatever of the two extreme theses, — the necessity and the impossibility of progress.

Therefore every human discipline can advance and can retrograde. The chances of advance and those of retrogression are incalculable. But among human disciplines, there are those which have many chances to progress and to progress rapidly; others, on the contrary, have few chances to progress and that very slowly. Human knowledge moves forward at a very fine pace when its results can be recorded; its successes are ephemeral and with no tomorrow, when such results cannot be recorded.

The results of any intellectual labor are recorded, that is to say, become an acquisition to civilization and humanity, in proportion to the number of persons who can appropriate them to their purposes and use them immediately. The more the intellectual effort necessary in the utilization of an invention is reduced, the better it is recorded and preserved in the human species, the better it is protected from any risk of deterioration or disappear-

ance. Accordingly a science progresses in proportion to the intellectual distance between the inventor and the assimilator. Between the intellectual effort necessary to the invention of wireless telegraphy and the intellectual effort necessary to use it, there is a tremendous abyss. Humanity might fall very low, while still continuing to make practical application of all the modern inventions.

Certain intellectual efforts do not record their results; that is to say, they serve little or no purpose, because the intellectual distance between the creator and the assimilator may be but slight. In all these disciplines, to understand is to be equal. And he who can be equal will not pass his life in understanding. To understand Plato rightly, one would have to be equal to Plato; and he who would be equal to Plato would not resign himself to passing his life in understanding him. He would produce something else, some new creation which would, in its turn, never be completely understood. Phidias, Ictinus, and Callicrates never handed down to any one the recipe for making a Parthenon. Architects may study it for centuries in its smallest details to no advantage. In law, old jurists are quickly forgotten; the greatest intellectual efforts often remain unknown; with each generation, everything passes away, the good with the bad.

Nearly all of the purely intellectual disciplines are subject to these rapid collapses when the general level of intelligence is lowered to even a slight extent. Furthermore, those who live in such periods do not notice them. Only the historians of a new civilization can establish these rapid declines following upon periods of the greatest brilliance and those from which the greatest results were to be expected. Unfortunately, the disciplines which have the best chance to record their progress and to be developed more and more rapidly, are no longer indispensable to humanity and are perhaps more harmful than otherwise. Humanity's old struggle against nature is

ended long ago. Man now has scarcely an enemy except himself and what he has himself created; but even this amounts to a good deal. It would be very desirable for the intellectual disciplines to advance at the same pace as do those of practical scientific value. This is perhaps possible but not certain.

§ 5. *Metaphysical Generalizations upon Evolution and History.* It might be very possible that all the factors of history that observation and human logic allow us to derive, have only a purely seeming influence upon historical evolution, and that the true cause, the superior force, is entirely unknown to us, perhaps even beyond the reach of our understanding. This hypothesis should not be considered unreasonable in itself. In this case, the intellect would remain powerless to penetrate the secrets of history; the imagination alone might strive to do so in a more or less vague fashion.

I: *Search for the Hidden Plan of the Universe.* A great many theories upon the philosophy of history have as their object "to discover the hidden plan of the universe." This plan being hidden to logical investigation, it can be divined only by invention, and however ingenious the invention, it could give to its work no character of certainty nor even of probability. This work will always remain metaphysical and constructive; it will always remain an arbitrary assemblage of hypothetical data which gives a more or less pleasing and harmonious glimpse of the universe, without this harmony's being able to confer upon it any character of reality or of probability. It is a "Weltanschauung" and all "Weltanschauungen" have the same authority in the eyes of the intellect.

It is not that these metaphysical constructions are useless or worthy of scorn. Far from it. Minds of the widest reach have devoted their most earnest efforts to interpreting the course of history by means of metaphysical con-

ceptions, and, in doing this, they have not been misled. Metaphysical constructions have at least this double use; (a) Like every generalization, they present events under a synthetic and more easily comprehensible form. They prevent the mind from losing itself in details. They augment the interest of the particular by making it unroll general ideas, and, up to a certain point, permit themselves to be rediscovered by means of deduction, in the realm of the concrete. Such is also the function of the juridical construction.

(b) From the philosophical point of view, they throw into relief all the enigmas concealed behind the most positive ideas. They show how man and his puny logic are overwhelmed in the immensity of the universe; they impel him to be modest, even with regard to truths that he believes the most certain.

The great danger for all of those who possess a "Weltanschauung" is to attribute to it a positive and objective value. The philosopher Iselin gives to his speculations upon the philosophy of history, the title "Philosophische Mutmassungen über die Geschichte des Menscheit," Philosophical Conjectures upon the History of Humanity. The expression "Mutmassungen" is perfectly accurate and indicates wonderfully well the scope of such works.

II: *Theistic Systems and Pantheistic Systems.* We have no intention of discussing nor even of citing the numerous systems of metaphysical interpretation of the world and of history. We may however be permitted to contrast the theistic and the pantheistic systems.

Theistic systems enlarge upon the well-known adage "Man proposes and God disposes." A God all powerful, eternal, eternally perfect, directs the history of the world and human destinies. Man made in the image of God can understand His qualities and His will and by that very means know even the directions of progress.

Pantheists reject this theory as antiquated and anthropocentric. For them, God is the world itself. It is self-created in the course of history and self-directed toward perfection. All its elements are at one and the same time nature and spirit, and all participate in the universal wisdom.

The two systems are equally justified and equally arbitrary. Every human intelligence which attempts to reflect upon the divinity is obliged to choose between the two alternatives. If a person tries to gain a clear idea of divinity, he is always more or less compelled to deify himself, to attribute to the supreme Being, his thoughts, his sentiments and his own way of willing and acting. His God will then be simply a creation of his brain, a purely anthropomorphic being whose existence such as he conceives it is indeed scarcely probable.

He who tries, on the other hand, to escape the reproach of anthropomorphism, strives to remove every human attribute from the divine personality. But with the disappearance of each human attribute, the figure grows paler; it gradually becomes effaced and ends in nothingness. It is only through an old habit of speech that any superiority whatever is preserved to this non-existing being. Man cannot worship what he is ignorant of. That is why the "perfection," the "progress," and the "future" of the pantheists and, accordingly, their historical constructions, are of no interest. Hegel's "Thought" had in it something human and hence comprehensible. The "unconscious thought" of the new Hegelians which is common to the universe as a whole is perhaps nearer the truth. But it no longer means anything to us; and one can hardly see what interest can be taken in toiling over a self-development which may, quite as well as not, end by becoming absorbed into the universal nothingness.

Bergson's creative evolution is, from certain aspects, metaphysical construction, and from certain other as-

pects, logical construction. The substitution of "intuition" for intelligence as a mode of knowledge runs the risk of reversing the scale of intellectuality and of placing the inferior above the superior modes of thought. The "élan de vie," the creative force which directs history, is a mysterious and hypothetical conception.

On the other hand, Bergson approaches positive logic in this sense, that the evolution created by life is for him contingent, is not predetermined, and that, according to his ideas, there is, it seems, no plan of the universe comprehensible to man, nor any in whose ultimate result man could be interested.

Finally, the Spencerian progress in spite of its claims to positivism has only a constructive value, which assertion could easily be established if we had the time to take up the criticisms which have been leveled at it. That does not do away with its interest, however.

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CHAPTER III

CHANCE

§ 1. INTRODUCTION.—§ 2. THE IDEA OF CHANCE: (I) SUBJECTIVE OR OBJECTIVE; (II) COMPLETE AND INCOMPLETE; (III) FREQUENCY AND SUCCESSION; (IV) CROSSING.—§ 3. CHANCE AND STATISTICS.—§ 4. POSSIBILITIES IN HISTORY.—§ 5. CHANCE AND LEGAL HISTORY.

§ 1. *Introduction.* In the history of Law and of civilization a large place should be assigned to Chance. Such is the solution that the multiplicity of factors, the impossibility of calculating their respective forces, and the non-existence of laws of realization, imposes upon whoever wishes to delude neither himself nor another.

Moreover this invoking of chance is not purely a convenient process of getting rid of the difficulties of calculation. Instead of simplifying matters, the intervention of chance singularly complicates them. For it would be saying nothing at all to hurl forth this word without attempting to point out its significance. This task brings us in touch with very brilliant and very profound literary works in which are encountered a great many men of the highest order of genius, all quite familiar with mathematics and often even mathematicians of the first rank. We have no intention, understand, of following them into the complexities of the "theory of probabilities." A very elementary conception of chance would suffice us, one which would enable us to gain a vague understanding of its philosophical nature. But all this literature, rich, full of imagery and clear in form, leaves one much perplexed, because the mathematicians who understand chance most thoroughly, on account of having studied it most thor-

oughly, are far from agreeing upon its most essential characteristics, and it is very bold to try to make a choice among authorities of the first order. Some decision, however, must be made in the matter in order to arrive at any conclusion.

§ 2. *Idea of Chance.* Every phenomenon the realization of which cannot be proved with certainty by means of its antecedents is for us the product of chance. This definition would not be that of a mathematician. The historical conception of chance is different from the mathematical conception. There is therefore a historical chance and a mathematical chance. The first is more complex, more disparate, but in default of the power to analyze it into its elements, one is obliged to take it as it is. Nevertheless the point in question is to understand the nature of this chance.

I: *Subjectivity or Objectivity of Chance.* History cannot be foreseen, or only imperfectly so, for two reasons. In the first place, we do not know all of its laws—I mean all hypothetical laws, all relations between things. And, if we did know them, it would be impossible to calculate their chances of realization, in view of their entanglement and their complexity. We should be like the gambler at the roulette board. The historical unforeseeable is composed therefore of two elements. It is impossible to take into consideration either the one or the other since we can know only the result, as a whole; but the two elements are of a very different nature.

Ignorance of laws is purely subjective; it varies with the times and with the individual. Logically it might disappear with the advance of science. The determinate part of history would then be increased and the indeterminate or fortuitous part reduced to a secondary place. The part of history which can be determined is not subject to what mathematicians call laws of chance or calculus of probabilities.

Mathematical chance is objective; it is inherent in the nature of certain phenomena and not in the state of human knowledge. It exists in the same way for all men. For an omniscient intelligence, chance would not be ignorance, but a law to whose authority this intelligence might have to submit. Some one has imagined a god throwing dice with a simple mortal. The god might know the results of the game before playing it, but he might lose provided the mortal threw the dice and the god was obliged to accept the mortal's wager without laying a wager himself. Between gods, chance would exist, not negatively as ignorance, but positively as knowledge. A perfectly symmetrical coin, a perfectly cubical die of homogeneous material, and a well constructed roulette board lend themselves to games of chance, and are all the better adapted to expressing the calculus of probabilities to the extent that their dimensions are accurately combined. With loaded dice and a falsified roulette, even if the players are ignorant of these defects, the indetermination of possible solutions, or the equality of chances, does not exist and the game is not fair. Accordingly, the situations in which certain solutions are equally possible, and therefore indeterminate, are entirely independent of human knowledge and hence objective. But is it possible to understand logically and scientifically how, from any given cause, a certain number of effects have equal chances of being produced? That is in no way contrary to universal determinism. Poincaré, among others, has demonstrated this very clearly, but we consider it needless to state his proof here. Since a series of small and closely related causes may each produce very different effects, the cause being trifling in proportion to the effect, the phenomenon is relatively indeterminate. It must be observed that this disproportion between the magnitude of the effect and the slightness of the cause may be artificial as well as natural. The difference between a certain im-

pulling force capable of making *red* come from the roulette and another impelling force capable of making *black* come out is infinitesimal. This is the cause. But the physical effect, the position of the ball upon the board at the moment it is arrested, is also infinitesimal. The agreement of the players, which makes the gain or the loss of a considerable sum depend upon this position, alone establishes the disproportion between the cause and the effect.

II: *Complete Chance and Incomplete Chance*. Whenever a mathematician studies any game whatever, he considers first of all the number of possible solutions that are in accordance with the nature of things or with the rules. A coin is tossed into the air; it will fall "heads or tails." Physically, it might roll over the edge of a floor and get buried in a crack; conventionally, such a case would be waived aside as not to be counted. And the game of "heads or tails" admits of only two possibilities of equal chances. Upon this basis, the mathematician will imagine a series of more and more complex hypotheses, by considering the possible results of every combination. But he waives aside completely all the factors of realization which he considers as incalculable and even as indeterminate. Given the rules of the game, he studies the probabilities and can point them out with certainty. He is concerned with nothing else. A pair of dice, a game of cards, and a roulette are to him abstractions; there is no need for him to see them function, and he is not interested in the movements of the players and the partners, which are, nevertheless, the true causes of the results which he seeks to foresee. The problems of the game are the problems of complete chance.

Historical chance is, on the contrary, incomplete chance. The historian is acquainted with a large number of factors of realization. He is able to evaluate their force to a greater or less extent; there are before him very powerful causes which are very nicely directed toward a deter-

mined aim. He sees contradictory forces, but he cannot divine which will be the victorious force of the future. The historian devotes himself very earnestly to the present — to any present whatever — in order to try to understand from it the solutions of the future. All his work is accomplished in the world of causes, through which he would like to foresee everything and explain everything. What he leaves to chance, he leaves in spite of himself. If he does not wish to labor under a delusion, he is obliged to recognize that his explanations are insufficient; his interpretation of history very unsatisfactory. He makes allowance for chance as one does for a fire; whatever cannot be taken away from it is left to it, and this is a great deal. For in life chance acts sometimes with an unforeseen brutality which changes the direction of human lives by a violent shock; sometimes, by a series of small shocks, continued and successive.

The study of causes in history is the essential task, the fortuitous element being only complementary to it. Nevertheless this element must be taken into account else we risk falsifying reality.

III: *Frequency and Succession, in the Laws of Chance.* The calculation of probabilities permits of the ascertainment of the chances of repetition of a certain phenomenon under certain conditions; the probable number of heads or tails in a certain number of throws, or the probable turn-up of a particular number at the roulette. Such a calculation also computes the chances of realization of isolated series that are considered as a whole, for example how many times the series "tail, head, head, tail," has a chance of being realized in a million throws. But it cannot take into account the whole order in which all the phenomena will be realized. It makes a study of the frequency and not of the succession. It can indeed give curious and unexpected information upon the frequency only because it neglects the order and the suc-

cession in which the various phenomena present themselves.

The hypothesis of monkeys setting up type or writing on the typewriter is one of the neatest illustrations of the theories on chance. Suppose there are a certain number of monkeys trained to set type or to write on the typewriter. They have the capacity necessary to make the imprint, but are incapable of understanding what they are doing. They act purely by chance, tapping indifferently upon the different keys, following impulses that are unknown to us and may be considered as completely undetermined. They will be allowed to work thus for a longer or shorter time. What will be the result of this work? Among them all will they have written a single sensible or correct phrase? Hardly. Will they have set up an entire book corresponding to some particular determined work? That seems quite impossible. Will they have reproduced faithfully, by working long enough, the text of all the books of this or that library? It would seem insane to suppose this possible for a single instant.

And yet they will have achieved a certain result, and the result which they will have achieved had no more chances of becoming realized than the reproduction of all the works in a library. Every time that a monkey chose a character, each of the characters had exactly the same chance of being chosen. The work finally produced, whatever it is, had, before the labor, only an infinitesimal probability of existing such as it is. The slightness of this probability, however short the length of the labor, defies imagination. Nothing in the calculation of probabilities admits of the foreknowledge of which one among the infinite combinations possible will be realized in preference to the others.

If, on the other hand, one is not concerned with the order in which the letters were chosen and is contented with finding out how many times the letter *a* occurs in

ten million letters, the calculation of probabilities intervenes. It begins by fixing very precisely the chances of this letter's reproduction, say ten million divided by fifty, if we suppose there are fifty characters. It is not probable that this number will be realized exactly; but the calculation permits of the establishment of the limits within which the reality will be likely to differ from this number. These limits are rather restricted. The probabilities of wider variance from a certain number decrease rapidly and may at a certain instant be practically neglected. It might likewise be computed approximately how many times the group "ab" or any other group of letters has a chance of being repeated. The calculation made beforehand will be verified not once but regularly, every time the monkeys are brought together and made to work.

Thus in history may one foresee up to a certain point the frequency of realization of fortuitous phenomena; it is on the contrary absolutely impossible to foresee the order in which these phenomena will succeed one another. The chances for the contingent elements in history to occur in reality among a small human group and during a rather short space of time would be represented by a fraction unbelievably small. What would be the fraction which would represent the chances of realization of the whole of history such as it might possibly have been established mathematically at any period whatever since the origin of humanity? Here no fraction however infinitesimal can be neglected, for reality would of necessity have been represented in the past by a fraction that was also very small. Whether a hundred or a trillion tickets are put into a box, the one which is drawn out will be quite as surely drawn out, although before the drawing the value of the ticket for one and the same prize was, in the first hypothesis, ten million times greater than in the second.

It is of little importance to the gambler to know the order in which the winning and the losing games will

occur, provided he gains the most possible; it is of little importance to the insurance company to know the order in which the persons insured will die, provided too many do not die upon any one date, which would upset his calculations.

Can the philosopher of history be equally disinterested in the order in which contingent historical phenomena will be produced and content himself with averages? Of course, the historian may attempt to submit a certain number of historical phenomena to the calculation of probabilities, and this will be very useful to him; but in doing it, he will not be making history.

Gambling and insurance have as their basis independent events which are complete at any one precise instant. For the gambler, it is the game; with each game, he gains or loses. For the insurance company it is a death, a fire, a storm, or the like. All of these events are independent of one another. At the beginning of every game, the gambler gets back exactly the same chances of winning and the same chances of losing. Every element of a series has its "*raison d'être*" in itself, is not influenced by that which precedes nor that which follows it.

In historical chance this is no longer the case. There are, strictly speaking, no distinct games. The influence of chance is continual, and the determination of the exact moment when the blow of chance makes itself felt is simply an arbitrary one. The union of the two germs which produced Napoleon I was a fact of chance, but an uninterrupted succession of fortuitous events was immediately necessary for him to be able to be born, grow up and accomplish his work in history. On the other hand, by admitting that we are able to reduce the effect of chance to a series of games lost or won through this or that historical force, these games would not be independent. The loser would remain under the effect of his loss

and would not begin a new game under the same condition as the first. Successive events are dependent upon one another.

Accordingly, the order in which the gains and the losses — to use the language of the game — occur, is far from being a matter of indifference; because, in history, the results of each game modify the conditions of the play, transform the chances of the different solutions possible. This order constitutes a factor of probability which would have to be employed in every calculation, if it were to be a question of computing historical chance.

IV: *Chance of Crossing.* We have seen that every and any law of realization is rendered ineffective by the possible intervention of obstacles. If normally a certain particular cause should produce a certain particular effect, a foreign phenomenon may interpose between the two and prevent the normal result from being produced. What we have called "obstacle" others have called "crossing," and have made it the basis of historical chance. Such would be the conception of Aristotle and Cournot: Nature has established laws which ought to lead to precise and determined results. Each of these forces bends its course directly and necessarily toward the object which is assigned to it. But the forces are numerous, and two or more of them may conflict; in which case, the objects of nature are not attained. Here is accident, chance. This theory has been illustrated by the following little parable: A stage coach runs from the town A to the town B. Another, from the town C to the town D. The two routes are both straight and without danger; but they form a cross, cutting one another at the point P. The two coaches, quite unknown to one another, set out at the same hour, at the same speed and have the same distance to cover before they meet each other at the crossing at which will occur the collision and overturning which will prevent both from reaching their destination.

For Aristotle and Cournot, these crossings are only rare; they are violations of nature's plan which render it defective but do not destroy its general outlines. For other philosophers, these crossing points are innumerable and constitute the fortuitous element in history. It is more correct to say that the chance of crossing is a particular form of historical chance; though perhaps a less frequent form than many others. It implies the existence of certain necessary laws, which can be obstructed only by other necessary laws. It does away with the so-called indetermination which reflection and experience allow us to perceive in a large number of phenomena. Accordingly, it would be wrong to try to trace back to it the whole of historical chance.

§ 3. *Chance and Statistics.* Comparisons have often been made between the calculation of probabilities and statistics. These two sciences deal in large figures, trace ascending and descending curves, and works in both subjects affect a certain resemblance in form. They have also a common object, *i.e.* to establish coefficients of probabilities which permit of an approximate prevision of certain future events. Both neglect the particular and derive averages. But the calculation of probabilities is a deductive science; it concerns itself with an entirely undetermined mathematical chance and refrains from all investigation into the causes of phenomena. Statistics is, on the contrary, an experimental science; it endeavors to group together the greatest possible number of concrete observations. It needs a large and exact documentation. It does not consider phenomena as undetermined; quite to the contrary, it employs the data furnished by experience in the discovery of numerous elements of determination. The fluctuations in various phenomena reveal to it at times certain special forces lost in the mass of causes and effects.

Let us suppose that the death of men of a certain de-

terminated group depends solely upon a game of chance, and that every time that a roulette of thirty-six numbers turned up the number thirteen, a human existence would be extinguished, but there would be no other cause of decease. Knowing the number of games to be played each day, the mathematician would establish his probabilities of death daily without departing from the domain of mathematical chance, and he could do this without any information upon the mortality of the past. There are in the existence of every individual chances and mischances of the same nature as those in a game of chance, by which life is prolonged or curtailed; but these chances are not all. The ordinary force of human vitality does not permit any man to pass beyond a certain age and not many to attain this maximum. Statistics aids one in forming a more or less vague idea of this. Many accessory circumstances, — climate, habitation, food, profession, and so on, have an influence for better or for worse upon the duration of life. The great use of statistics is to disengage these influences and substitute a number of small determined factors for the general indetermination.

But statistics only establish probabilities. No more than the calculation of probabilities does it replace chance by laws. It analyzes the general indetermination of history, but does not suppress it. Certain thinkers have been profoundly impressed by the revelations of statistics, and the unforeseen character of its conclusions has led them into a misunderstanding of their logical nature. One is surprised to see a mind like Kant's commit such an error. No more than the laws of chance, are the laws of statistics the laws of realization. They determine nothing; they neither possess creative force nor reveal any mysterious creative force. They reveal simply a certain order in an environment which the human mind for a long time considered to be entirely without order.

§ 4. *Possibilities in History.* There are in history two intellectual habits one of which is as much to be deplored as the other. It is absolutely futile to ask oneself what the world would have become if some particular hypothetical event had been realized, or if some particular real event had not been realized. What would have happened if Hannibal had destroyed Rome? If Louis XVI had been able to escape abroad? If Napoleon had not been born? The course of history would have been transformed by either of these hypotheses; but in what way?

After a definitive victory of Carthage, the play of history would have offered a multitude of diverse possibilities, among which chance would have decided, as it did decide among the innumerable possibilities which were opened up to humanity the day following the victory of Rome. This incessant intervention of chance renders purely fanciful any reconstitution of the present and the future upon an unrealized hypothesis. History is a series of very rapid games; with each game, the partners are changed; the rules of the game and the distribution of chances are also new; but the combinations possible are always numerous and only a single one of them will be realized and will dictate the rules of the next game.

The philosophy of chance teaches us again that history is not a succession of phenomena bound together by necessity, and that to stitch facts and facts together is not sufficient to understand it. Each moment of history is — in addition to being a reality — a totality of possibilities which share among them a certain number of chances. The reality of today is only one of the possibilities of yesterday, and history ought, as far as possible, to endeavor to discover in its immediate past not only its cause, but its chances in the midst of the vanished chances. Above all else, it ought not, as it has so often been made to do, to attribute to itself the sum total of the chances of the day before, through the single fact that it triumphed over

all the contrary chances. Before it became consecrated as real, the reality of today was only a possibility in the midst of many others.

Such is the incident of the ticket of the canteen-woman who won the million. When the winning number was proclaimed, the crowd, much moved, applauded obstreperously. Why? It was not known to whom the ticket belonged. But the crowd, instinctively, understood for a moment the meaning of history. A paper which was but a trifle had acquired in an instant a very great share-value; other papers which were worth the same a few seconds before, had lost all value. But if some one had tried to explain, the day before the drawing, why the canteen-woman's ticket would necessarily have to be drawn, the common sense of the people would not have listened. In the world of historians perhaps the explanation would have been heard.

§ 5. *Chance and Legal History.* From the fact that chance has of necessity been an element in history and accordingly in the history of Law, one must not infer that a general indetermination is to be found there. As it has been said, although throwing dice is a game of pure chance, there is no chance of throwing a double seven.

The factors of determination are very numerous and very complex. They do not act in the same way. Some are divergent forces tending to impel law and civilization into unknown regions; others are convergent forces tending to bring them back toward a precise axis and to maintain in the diversity of the centuries certain like characteristics. Finally, others still are mixed and can act in either one way or the other. Race, or more generally speaking, the physiological history of humanity, is very difficult to study in the past and to foresee for the future. It is this which directs humanity in the most unexpected directions. "The greatest chance is the birth of a great man," Poincaré has said. It is not solely a

question of great men. All marriages and all births are facts of chance; great race mixtures are due to circumstances difficult to foresee. It is these which give to humanity its essential intellectual characteristics and can cause its divergence in the most unknown directions.

The ensemble of material factors and, among them, human inventions, are also scarcely to be foreseen. They modify all the conditions of existence, the foreign economic relations, and the home politics of countries. They engender new juridical conceptions. These are evidently forces that are essentially divergent. The creative and mythical spirit found in a great number of human beings, the failure to understand the value of abstractions, and the pursuit of chimeras, may lead peoples to the right or to the left, at the chance of circumstances. The mind which cherishes myths is a divergent force by itself, but especially so because it paralyzes the higher intellectual forces of humanity.

These higher intellectual forces operate indeed for the purpose of leading back toward an immutable axis the civilizations which wander away from it. These forces are the juridical categories, metaphysical law or the idea of justice, and metaphysical morality. Juridical categories form the abstract logic of law. No positive law conforms to them entirely. But being above and beyond human psychology, it is certain that so long as humanity preserves a sufficient degree of intellectual power, the more or less complete knowledge of categorical truths will constitute an element of juridical thought. The metaphysical justice formulated in the rule "*suum cuique*" will no longer ever be confused with positive law. Nevertheless, the law which departs from it has a tendency to be led back to this axis, a tendency varying with the intellectual state of a people and the constraint of material forces under which this people labors at any given moment.

Metaphysical morality or the idea of the Good is

equally a regulative force. It has scarcely ever been the sole rule of conduct of an individual or a society. But it constitutes an immutable principle which tends to give to societies a certain unity of direction. Collective thought under its various aspects — as well as the social morality which is its product — has in it nothing of the immutable. It depends essentially upon the material form of human groupings and varies with these changes in form. But since these forms are limited and these changes made not without difficulty, this special factor is quite as much a factor of conservation as of variation

The philosophy of chance seems to me the most natural conclusion of a philosophy of legal history. It substitutes the search for probability for the search for certainty. It shows the complexity of causes where others wish to see only a deceptive simplicity. It permits man to utilize, so far as possible, his own ignorance. It inspires a salutary scepticism: not that of negation, but that of prudence, — the kindly, scrupulous, and searching scepticism which might well be the best instrument of progress for humanity.

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AUTHOR'S APPENDIX TO THIS
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I

In the field of pure intellectualism it can not be denied that a number of celebrities of the nineteenth century achieved fame, chiefly through qualities of form; they were splendid rhetoricians. Rhetoric when it is beautiful has great charm and conspicuous inutility; but it is not lacking in danger. Very often it is the art of masking the real difficulties of thought. It carries the mind across a world of agreeable pictures cleverly retouched, which seem easily comprehensible when often they are wholly wanting in meaning. It counsels the multitude against all mental exertion and they readily submit. It is certain that the law, history, and philosophy have little to gain by too much surrender to it. In legislation, the rhetorician is the great favorite alongside of routine and utopianism. He obstructs desirable legislative studies and rushes into superficial reforms. In history, he is more clever in deforming the past to flatter the wishes of the crowd than in extracting principles of solid experience. In philosophy, he delights in a vague optimism and easily arrives at an explanation of the universe summed up in a few simple and harmonious propositions.

In the domain of the mental sciences, the rôle of rhetoric has for a number of decades cut down the profit of more positive and fruitful methods. It is assuredly not the moment to expect a springtide, especially if one believes, as I believe, that the fate of humanity is connected less with the adoption of this or that institution, less with the expansion of moral sentiments, than with the

progress of the mental sciences. Without an understanding of the philosophical and logical bearings of law and its institutes, without a tolerably exact comprehension of the mechanism of history, it is to be feared that the best will can not avoid falling into irreparable errors. Happily, there is much room for confidence.

A hopeful portent for juristic science was the appearance in 1919 of the second edition of Géný's "*La méthode d'Interprétation*," the first edition of which (1899) was long since out of print.¹ We see here the effort of a great jurist to establish the true nature of law alongside the texts which are but an awkward expression of it, without, however, falling into arbitrary constructions. But of various works giving, as it seems to me, much more than a simple method for resolving juridical conflicts in detail, we there find systematically grouped and evaluated, as well with scrupulousness as with impartiality, the ideas of all those who wish to go to the bottom of juridical science. The second edition of the "*Méthode*," augmented and set in proper order, constitutes with Géný's "*Science et Technique*" an encyclopedia of philosophy of law of the most modern kind.

My distinguished colleague, Biagio Brugi, formerly of the University of Padua and now professor at the University of Pisa, has published, notwithstanding the war, a remarkable volume entitled: "*Saggi per la storia de la giurisprudenza italiana*," an historical introduction to the law, of the highest scientific importance. Circumstances prevented earlier acquaintance with this work. This was a serious omission which must be repaired. The always profoundly original ideas in all divisions of the law of this Italian jurist have long been familiar to me, and it will be understood how much I have regretted not

¹[Selections from this work were incorporated in "*Science of Legal Method*," Vol. IX of this Series, pp. 1-46.]

to have seen earlier his new work. It is difficult to point out here how great the profit I should have been able to derive from it. Those jurists who have studied the Romanists of the Middle Age — and they do not encumber the terrestrial globe — count Biagio Brugi among their masters even though they may never have profited by his oral teaching. Such is my case. Likewise am I able to point to an intellectual parentage which brings us into close association. Neither of us has treated the old jurists as if they were archeological curiosities; rather we have regarded them as masters whose vigorous logic may well instruct the most modern intellect. I have been happy, also, that Professor Brugi has seen fit to felicitate me for my recognition of the great jurists of the olden time. This recognition which, however, is far from doing justice to science, I owe to his counsel and to his example. One of the great misfortunes of juristic science is the ease with which it forgets quickly and completely its creative personalities. Philosophy lives and changes equally with the law, but, yet, who is the philosopher sufficiently antiquated that he is forgotten? And who is the jurist sufficiently illustrious that, after some centuries, anything of importance of his intellectual genius survives?

The work of my colleague and friend Huvelin, on "*Furtum*," had already been published more than four years when I had an opportunity to study it. The book is one of Roman law and its author a specialist who is absolute master of his science. This erudite work has a limited purpose — a study of the idea of "*furtum*," theft, in the ancient Roman literature. Since we do not deal here with Roman law in the strict sense, the concrete results obtained by the author do not interest us directly. Rather it is the author's method and the general spirit of his work.

Huvelin has collected with a conscience without precedent all the Latin texts concerning "furtum" of the first epoch of Roman history, whether literary, epigraphic, or juridical, and has constructed out of them a most ingenious commentary. He has compared his materials with a very special care for their chronology, to the end that the slightest variations in the concept under investigation might be easily understood. It may appear on first impression that chronology and history are two inseparable notions, and one will often find historians, and historians of the law, largely interested in the details of chronology. It is nevertheless true that sometimes liberties are taken with chronology which are not always excusable. Thus to take a typical case it has long been seen how the Romanists of the Historical School have manipulated the texts of the pandects as if the jurisconsults represented had all been born at the same time. This is a caution for all historians of the law and likewise for historians in general. If they understand their chronology they do not always employ their knowledge, nor, on the other hand, do they always make it clear that it should be consistent.

By this rigorous method, the author sets himself the task of bringing to light a series of minor concrete data from which the notion of theft in the epoch to which the author limits his attention, will be definitely fixed. But the punishment of theft is only another way of speaking of the protection of property and of possession. The penal idea of "furtum" in primitive ages defines for the epoch the civil idea of property. We are not further concerned with any of the problems which engage only the specialist, but juridical psychology, and the whole history of civilization are interested in the solution. In this regard, as well as many others, the solid learning of the author ought to lead to juristic considerations of the highest order. Furthermore, the still mysterious evolution of juridical technic is revealed in this great work. One may

see how the popular law and the confused notions of ancient Rome became condensed in precise definitions and in a learned system. While the author has not formulated in his first volume, his conclusions, it is invaluable for the study of juridical logic and its development.

The tendency of theorists in the law to enter the higher spheres of philosophic thought is noticeable. I do not purpose in this brief discussion to give a complete idea of it. But how the philosophers, on one hand, and practical lawyers, on the other, regard the situation, where co-operation is necessary, may lead to the refinement and the realization of the whole of legal theory. It is clear that the attitudes will vary according to individuals.

I take the liberty of noting simply by title of identification the very kind appreciation of this work by my colleague Millioud in *Bibliothèque Universelle*. Making allowance for what is due to his friendship, I have reason to hope that he does not regard it as destitute of all philosophic interest.

With reference to practical lawyers, the encouragement I have received from them demonstrates that they are far from being unfriendly to theoretical works. The spirit of the Lausannean juridical world turns naturally to the most abstract problems of legal science. The ancient university traditions and the presence of the highest Swiss magistracy provide a favorable setting for this inclination. Thus may be explained the article which one of the chief magistrates of the Canton of Vaud, cantonal judge M. Estoppey has been good enough to devote to the author in the *Schweizerische Juristen-Zeitung*. He shows with a generosity quite evident how the most intelligent practitioners take an interest in the slightest theoretical researches in new fields of thought.

The theory of chance and its function in history doubtless is somewhat outside the regular scope of my book.

But on this subject I have been happy to find the opinion of a friend of my youth, M. Gaston de Marcilly, who for some years has investigated various questions in higher mathematics and metaphysics. In pointing out to me certain omissions and in indicating some difficulties touching the solution of the notion of chance, he admits the justification and novelty of the classification of chance as objective or subjective and as complete or partial, which is made the base of my discussion.

II

The work of Vaihinger, "Die Philosophie des Als Ob: System der theoretischen, praktischen, und religiösen Funktionen der Menschheit auf Grund eines idealistischen Positivismus," was known to me at the time of the writing of the French version of my book, but inadequately. On this point I may be reproached. As early as 1911, Vaihinger's thesis had been presented to the Philosophic Congress at Bologna. Various philosophic journals reviewed it in 1912. In 1913, the work appeared in a second edition. All this did not attract my attention, which perhaps is excusable in a historian of the law who is not a philosopher by profession. It was hardly until 1916 that German jurists made reference to this work for the solution of certain problems of juridical logic. At this time I was able to make a somewhat superficial survey of the first edition. It was not until the year 1919 that I had come to the conclusion (after the 1918 edition of my book) that I ought to devote some time to the theories of Vaihinger and to the connected literature which had already become abundant. I avail myself of the opportunity to present here in a summary way the results of this investigation.

Whatever may be the rôle of Vaihinger's work among professional philosophers it has for me a special interest

in the fact that it emphasizes that inferior order of practical logic which has seemed to me of importance in legal reasoning. A large part of what I had called "rational" is denominated "fictional" by Vaihinger. I have had reason to ask myself if my efforts to penetrate the mechanism of juridical life have not come too late, or if they have not been superseded by this important work.

"Die Philosophie des Als Ob" is a bulky volume of more than eight hundred pages. From beginning to end the one consistent idea, exploited in a variety of forms, is that of fiction. The effort is to show from all sides what fiction means, that it may be discovered in all sciences, and that it has in them a place of considerable importance. When, very often, the author places reliance on writings which support too exclusively a single thesis, he is carried away by the desire to prove too much. It might be unjust to cite here the proverb: "he who seeks to prove too much, proves nothing"; but it is certain that the argument would have been advantaged by less extensive claims.

The repetitions are numerous. The most important ideas — at least at the moment — are not always marshaled. It appears sometimes that ideas which should stand out in advance are deferred. The work therefore is poorly constructed, which is excusable when it is considered as the labor of youth published long after it had been composed. And the reader who should fall into some confusion as to the significance of the work may perhaps also be excused. It should, moreover, be remarked that the style is clear and agreeable and that the hours spent in communion with this large volume are far from lack of charm.

"Wie kommt es dass Wir mit bewusst falschen Vorstellungen doch Richtiges erreichen?" How is it that with concepts known to be erroneous we are able to at-

tain correct results? This is the problem which is presented.

From the beginning the effort is made to show that nearly all — if not all — intellectual activities employ the false in order to discover the true: that is to say by the use of fictions. The author does not find great difficulty in pointing this out in a large number of instances in the field of the moral sciences — metaphysics, ethics, esthetics, law, — as well as in the exact sciences — chemistry, physics, mathematics. Thus, in general logic, all classification — excepting genetic classification, — schematization, abstraction, arbitrary grouping of concrete phenomena, etc., etc., lead us into a world of imaginary beings which we well know do not exist. Medieval man, primitive man, the man healthy in mind and body are creations of our ideas. The basing of economic laws on the idea of egoism, the inventing of a social contract to explain the relations of the individual to society, the attribution to human beings of an inexplicable freedom and the capacity of weighing acts for the purposes of responsibility, etc., etc. — all these intellectual operations and a host of others of a similar kind are pure fictions. Because those who perform these operations take into account or ought to take into account what they affirm of facts with inexactness or only with partial accuracy, has the effect of making the truth more comprehensible and more readily explainable. But if it may not be necessary to insist on this, it is quickly apparent that the mathematics are especially rich in concepts of this sort, since its elements, the most simple to the most complex — point, line, surface, infinity, space of n dimensions, $\sqrt{1}$ and that the bases of all reasoning, the categories — cause, quantity, quality, relation — have no actual existence whatever.

This multiplicity of fictional notions being established, the author concerns himself to determine their nature, to point out their mechanism, and to justify their employ-

ment. Fiction is compared with hypothesis which it tends to resemble in certain respects. But hypothesis makes a pretension of actuality. It is a truth which awaits confirmation, or it is an error which precedes refutation. Fiction avows its discord with fact; it is certainly unreal and remains such always. Yet it makes claim of a usefulness of function.

Moreover, the same concepts may change character. That which is fiction may become hypothesis, and that which is hypothesis may attain the dignity of dogma. Nothing is simpler than that an hypothesis may become a dogma. But that a fiction may be changed into an hypothesis is perhaps somewhat more difficult and less often occurs. Yet the possibility is understandable. This progression from negation to affirmation is one of the primary forms of what the author calls "*Ideenverschiebung*" ("transformation of ideas"). The universe order of movement from certitude to doubt, and from doubt to negation—dogma, hypothesis, fiction—is a form of transformation of ideas still more frequently met. Primitive and naïve minds believe in the immediate reality of their sensations and their ideas; they know only dogmas. More discriminating minds reduce these dogmas to the level of hypotheses; and the severely critical intellect changes these hypotheses into fictions.

In order to explain the mechanism of fictional judgment, the author makes a very fine analysis of the expression "*als ob*" ("as if"). He brings fiction to the analogy of comparison. It is comparison of an existing thing with another thing which is said not to have an objective reality, whilst affirming that the non-existent thing is useful or necessary for the understanding of the existent thing—a subtle process which demands a high order of intellectual capacity. For *Vaihinger*, that which justifies the fiction, as, moreover, any other logical method, is its utility. For him there is no other criterion of truth.

Man may not hope by the process of a theoretically perfect reasoning, to acquire knowledge of the concrete objects of his senses; these objects being for him inaccessible. He ought to judge all things by practical results without concerning himself with their intrinsic validity. "So ist die Wahrheit eben auch nur der zweckmässigste Grad des Irrtums und Irrtum der unzweckmässigste Grad der Vorstellung." Fiction prosperous in its results is justified in its basis; it is subject to condemnation if it is not successful.

Thus Vaihinger comes to a special theory of knowledge. Thought being of a nature different from the actuality is not able to apprehend it directly. It must accomplish its ends by ingenious combinations of ideas. The dogmatism which believes in the concordance of actuality and thought is a logical optimism which is the life of illusion. It bears no fruit. The scepticism which believes in the incapacity of human reason is paralyzing. It is sterile. The critical method alone is productive since it attaches no importance to the theoretical value of thought and believes only in its practical worth. The author would seem to have the ambitious purpose of reducing as far as possible the meaning of all logical forms into as many other forms, to the end that they may attain another value based on the service which they are fit to render to humanity.

The function of logic in its lower sense has long been neglected in the changes of human civilization. The processes which we have called "rational" and which others have styled "common sense" or "practical reason" are the woof of the life of peoples and of individuals. Very rarely the superior forms of thought intervene in human action but even when they are reputed to play a part their intervention is often illusory. But, when, on occasion, mankind proceeds to act with tolerable results with

tools, which at other times have been regarded as unfit, it may be asked whether the error is not one of selection and if the logic of the practical man is not on the whole better than that of the theorist. As to that, there is a tendency to exact practical reasoning to the disadvantage of theoretical reasoning, a tendency very marked at the present time among a large number of philosophers.

Vaihinger lays the basis of both in fiction and strips them of any intrinsic value without passing judgment on them before their results are ascertained. He therefore creates a special kind of pragmatism which conflicts with the American pragmatism. The pragmatism of Vaihinger is essentially logical. He reduces truth to utility. It is for the sake of utility that he would justify, value, and classify the various aspects of mental effort. We persist in believing that there are noxious truths and beneficent falsehoods, but that the pious deceit, though excusable from the point of view of morals, is fit for condemnation in the light of science. The standard of logic has nothing in common with the standard of utility. That which is practically true or false is also theoretically true or false, and in reverse. All logical form should be evaluated by its concordance with truth.

But the "truth" is not the "truth" of ancient dogmatism. It is a truth of scepticism. It makes allowance for the undeniable fact that no man is able to draw anything from his own mind except what is subject to all sorts of weakness in the quality of man and in the character of the individual. This statement does not discourage the author. He makes the most of it. Vaihinger, moreover, has taken a very clear position against ancient scepticism and modern scepticism. "The Greek held so closely to, and was so dependent on, direct representation, that when these direct impressions failed him, he often despaired of thought altogether. Where the ancient sceptic observed that thought goes its own way and departs

from the actuality, he at once concluded that we must abandon all thought as worthless, without taking account of the fact that this thinking does yet lead to practically correct results." This last statement itself is open to criticism. For how are we to know that the efforts of thought are practically correct? These also may be illusions. We can not attain more certitude of practical truth than of theoretical truth. We must content ourselves with the results of our thinking because we have nothing else at command. Our truth, our error, our absolute, our relative, our abstract, and our concrete are imperfect and uncertain. But they are none the less our only possible guides of our mental activity.

Consequently, error is logically reprehensible even though humanity in its first steps upward has drawn from it the primary elements of civilization. "Common sense," "reason," "fiction" are of the highest importance in life as it is, but of secondary value in logic.

We have defined "fiction" as "the statement of an erroneous fact with the knowledge of its falsity." The definition of Vaihinger is not much of a departure: "What we take as fiction is every representation of an object and every supposition concerning it, in spite of the fact that we are conscious that, at the same moment, this representation or supposition does not correspond in some respect to the actual truth of the matter." It is not a fiction if the fictional idea is not recognized as such. Consequently, what may be fiction for one may not be fiction for another. There is no utility in inquiring if the State, God, Nature, Liberty are fictions or not, since each one is free to choose, according to his beliefs, whether they shall be presented as such or not.

He who does not inject anything of actuality in an abstract formula which is presented as true, does not deal with fiction. He is guilty of error, whether in good faith

or in bad faith. This species of error, which we have called "myth," proceeds from a wholly inferior sort of mental activity.

The non-concordance with actuality which is not willed is not fiction. Any classification of it can only be incongruous. Consequently, Vaihinger does not appear to hold himself within the limits which he himself has fixed by his own definitions. He falls back to the form of "als ob" (as if), one of the inferior methods of thought.

As it seems to me, it will be unfortunate to treat as fictions the superior and scientific forms of thought: e.g., the larger part of the concepts of mathematics and the categories of metaphysics. No doubt we must admit that they are neither perfect nor definitive. The notions of cause, substance, the absolute, quality, quantity may vary and have varied. We conceive these things but since we do not have the power of apprehending the actual abstract and concrete except in a partial way, we are unable to affirm anything of their objective nature. We are not able to employ them other than to regard them as eternal truths superior to mankind, and which would exist even though humanity did not exist. Through them the mind may exert itself with maximum effort to penetrate most intimately a world of enigma. Through them it may reach new ground whilst the true fiction never touches anything new. We may dispense with the true fiction, but with categorical truths, never. The one is infected with a willed and calculated inexactitude; the others are imperfect and perhaps inexact because it does not lie in the power of man to make them more perfect and more exact. May the two points of view be combined under the same idea?

Vaihinger does assimilate them but without completeness. He distinguishes from the start two species of fiction:

1. Those which contradict the truth without containing in themselves any element of contradiction. Thus it is in juridical fictions when, for example, a person is presumed to be alive though already dead. The author calls these semi-fictions.

2. Those which contain in themselves the elements of contradiction: e.g., the atom, thing-in-itself, point, line, etc. The greater part of mathematical and metaphysical concepts are of this kind. The author calls them "true fictions."

Between these two groups, Vaihinger sets up certain oppositions. The semi-fiction simplifies the reality. The false statement has only a provisional function and is admitted only with the privilege of correction before the conclusion is arrived at. "Sie fällt im Laufe der Rechnung auf." It drops out in the solution.

The "true fiction" complicates the reality. The false element is only admitted under constraint and can only be eliminated in the process of time and with the adoption of a similar but more rigorous method of reasoning. "Sie fällt einmal im Laufe der Zeit weg." It drops out in the process of time.

The opposition may be pushed too far. The two logical operations will then appear as very different and when arranged in a hierarchy of human thought will seem too much disconnected. No doubt, since all is uncertainty in this world, it is permissible to speak of fictions. They have the same claim to exist as all the objects which surround us, as all our pleasures and all our pains, and as all the ideas which cross our minds in life or in death. But this assertion which, of course, is not without its value will only introduce to our theory of knowledge utter confusion if we do not distinguish sharply categorical and metaphysical fictions from logical fictions, and the fictions of wakefulness from the fictions of sleep. Also, the reconciliation which Vaihinger makes of

law and mathematics seems more apparent than real. Because the law is preëminently the domain of logical fiction, it may be there employed without inconvenience as without great profit. Mathematical concepts, emphasized by the author, belong to categorical fictions which are entirely constituted of contradictory elements and which are capable of considerably increasing human knowledge.

The work of Vaihinger is very suggestive. It abounds in ingenious and original ideas. It does not, however, require of us a recasting, in its large outlines, of our general treatment of juridical logic.

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